

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

— — —

IN RE: AUTOMOTIVE WIRE HARNESS
SYSTEMS ANTITRUST

MDL NO. 2311

STATUS CONFERENCE / MOTION HEARINGS / FAIRNESS HEARINGS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
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1 Detroit, Michigan

2 February 28, 2018

3 At about 10:03 a.m.

4 — — —

5 (Court and Counsel present.)

6 THE CASE MANAGER: Please rise.

7 The United States District Court for the Eastern
8 District of Michigan is now in session, the Honorable
9 Marianne O. Battani presiding.

10 You may be seated.

11 The Court calls Case No. 12-md-02311,
12 In Re: Automotive Parts Antitrust Litigation.

13 THE COURT: Thank you, Kay. Good morning.

14 THE ATTORNEYS: (Collectively) Good morning.

15 THE COURT: We ordered this nice weather compared
16 to all of our snow for you, so I was glad to see that. I got
17 a little worried the last few weeks but we're okay.

18 All right. Let's start with the report from the
19 Special Master. Mr. Esshaki?

20 MASTER ESSHAKI: Yes, Your Honor. Thank you very
21 much. Good morning, everybody.

22 I can report that the motions before the Special
23 Master seem to be dwindling, which is a good thing, and I
24 think that's a natural occurrence of the fact that we have
25 handled as of yesterday 78 of those, and in so handling them,

1 we have expressed the views of how we will handle those style
2 motions so they can be used for precedent when they come up
3 in other cases. So that I believe is the reason that the
4 motions are dwindling down.

5 Yesterday, as I said, we handled motion number 78,
6 the Denso motion, we made a ruling on that, the order is to
7 follow. I'm aware that there was a motion to compel Tokai
8 Rika to produce -- or discovery against Tokai Rika which has
9 been held in abeyance or withdrawn. I am not aware of any
10 other motions that have been currently filed.

11 Has anyone on any other motions that I'm not aware
12 of that have been filed for consideration by the Master?

13 (No response.)

14 MASTER ESSHAKI: I don't think so, so that's the
15 extent of it, Your Honor.

16 THE COURT: Okay. Does anybody have any questions
17 or comments for the Master?

18 (No response.)

19 THE COURT: All right. Thank you much.

20 The next item is the status of the settlements.

21 Good morning.

22 MS. SALZMAN: Good morning, Your Honor.

23 Hollis Salzman for the end payor plaintiffs.

24 I'm pleased to report the indirect purchaser
25 plaintiffs, that is the end payors and the auto dealers,

1 we've been working very hard in the case, working through
2 discovery issues, but we also are pleased to present that we
3 have since the last status conference 22 new settlements.
4 Some of those are not yet public but we will be filing
5 preliminary approval papers with the Court we hope in short
6 order. That brings the number of cases that are fully
7 settled up to 28.

8 THE COURT: I'm sorry.

9 MS. SALZMAN: 28, leaving 13 cases remaining to be
10 fully settled. Of those 13 cases, those cases all have at
11 least one settling defendant, and ten of those cases only
12 have a single defendant remaining in them. We currently have
13 only ten remaining defendants in the indirect purchaser
14 plaintiff cases.

15 And we -- just skipping to the next bullet point on
16 your agenda to round it out, we have been working, the
17 indirect purchaser plaintiffs and the defendants, the ten
18 remaining defendants, have been working diligently with the
19 Settlement Master exchanging the necessary discovery or
20 working through issues to exchange the necessary discovery
21 and to tee those cases up for mediation.

22 THE COURT: Let me see if I understand this. As to
23 the end payors --

24 MS. SALZMAN: Yes.

25 THE COURT: -- you have in total ten remaining

1 defendants?

2 MS. SALZMAN: Correct.

3 THE COURT: In how many parts?

4 MS. SALZMAN: In 13 cases. Some of those
5 defendants are in multiple cases.

6 THE COURT: And you are working with the --

7 MS. SALZMAN: We are working with the
8 Settlement Master, Judge Weinstein. Not all the cases are
9 mediated with him. If the parties want to use another
10 mediator, we do so, but it all gets coordinated through his
11 office.

12 THE COURT: Okay. And as to the auto dealers?

13 MR. BARRETT: Good morning, Your Honor. This is
14 Don Barrett for the auto dealers.

15 We work hand in hand with the end payors and have
16 for -- since this case started as far as settlements are
17 concerned, and everything that Hollis said is correct.

18 The only thing that I would add is that there is
19 one defendant that sticks out, and that's Toyoda Gosei. They
20 are the sole defendant in six of the remaining cases. And
21 they -- I don't know, it seems like when I was a little boy
22 and I fished a lot, there was -- you know, we had cricket
23 boxes in the south, and it always seemed like the last two or
24 three crickets were the hardest ones to catch, but we always
25 did.

1 THE COURT: All right. Defendants, do you hear
2 that? Who is the cricket in here? I don't know. Okay.
3 Thank you.

4 MS. SALZMAN: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 MR. KANNER: Good morning, Your Honor.

7 Steve Kanner on behalf of the direct purchaser plaintiffs.

8 I'm pleased to tell the Court that we are currently
9 concluding settlements, some of which have been sitting
10 around for a little too long, and by -- what I mean when I
11 say concluding, it involves the fine points of the settlement
12 agreement, things like cooperation clauses, production of
13 additional materials at trial, if that's necessary.

14 Nonetheless, Your Honor, these three settlements,
15 and that doesn't include the one that was submitted to the
16 Court yesterday, that was with respect to Tokai Rika, we
17 filed a motion for preliminary approval which effectively
18 concludes the active OSS litigation. I say effectively
19 because, of course, Takata is in bankruptcy, and our
20 colleagues have been active with the bankruptcy court and in
21 perfecting our claim, and we do expect the class to receive
22 some benefit as a result of our activity in the bankruptcy
23 court. So OSS seems to be, with the exception of the
24 bankruptcy matter, off the books.

25 Now, with respect to the settlements --

1 THE COURT: Do you have some exception in the
2 bankruptcy court to continue this action or discussions
3 with --

4 MR. KANNER: We have. We filed a claim, we are
5 discussing this with Tokai Rika bankruptcy counsel.

6 THE COURT: Takata.

7 MR. KANNER: Takata's bankruptcy counsel. Excuse
8 me.

9 THE COURT: Okay.

10 MR. KANNER: And I do -- I'm optimistic with
11 respect to the amount, I don't know, but there will be some
12 benefit to the class.

13 THE COURT: Okay.

14 MR. KANNER: Now, the settlements I was referring
15 to, the three additional settlements, they cover nine
16 separate cases, and we are truly in the final settlement
17 stages of concluding any agreements that are out there, and I
18 expect to report to the Court -- I expect the Court to hear
19 from us certainly within the next few weeks as motions for
20 preliminary approval are filed.

21 THE COURT: All right. Now, there I know was a
22 requirement that directs submit dates for mediation on all
23 parts. How is that?

24 MR. KANNER: Indeed, Your Honor. Judge Weinstein
25 created a new sense of urgency which has created a momentum

1 to remove the remaining cases into that posture. And that
2 includes all cases with live complaints that have been served
3 or otherwise not subject to binding arbitration. And we are,
4 in fact, in multiple discussions with multiple defendants to
5 coordinate those dates. I believe March 16th or 17th is our
6 deadline to get back to Judge Weinstein and report on who we
7 are going to be mediating before, the dates and related
8 information. So we are moving ahead.

9 THE COURT: Thank you.

10 MR. KANNER: Thank you very much, Judge.

11 THE COURT: A little faster, please.

12 MR. KANNER: Well, that's right. It is -- actually
13 it is much faster now with these --

14 THE COURT: It is moving faster now.

15 MR. KANNER: Thank you.

16 THE COURT: Okay.

17 MR. PARKS: Good morning, Your Honor.

18 THE COURT: Good morning. TEDs.

19 MR. PARKS: Manly Parks, from Duane Morris, on
20 behalf of the truck and equipment dealer plaintiffs.

21 We have three truck and equipment dealer plaintiff
22 cases with claims remaining. One of those three cases is
23 occupant safety systems, and the claim relates to Takata, and
24 as Your Honor knows, that's bound up in the bankruptcy
25 proceeding, and we are, as other plaintiffs' counsel in the

1 other classes, are involved in those discussions and
2 perfecting our claims there and that will take its course.

3 With respect to radiators, one of the two other
4 remaining cases, we have reached an executed settlement
5 agreement with Mitsuba, and we will be filing a motion for
6 preliminary approval of that settlement with the Court. What
7 we are hopeful of doing, and we have ongoing settlement
8 discussions with the last remaining defendant in radiators,
9 and should we be able to reach a settlement there, ideally
10 we'll be able to present the Court with a motion for
11 preliminary approval of those two settlements together, and
12 that's becomes important from the perspective of trying to
13 mitigate the cost of notice, which are significant given the
14 size of the potential class here, and to the extent that we
15 can bundle those notices together, we will try to do that.

16 That leaves starters and alternators, which we
17 think of as kind of a single case for discussion purposes and
18 administrative purposes. There are two remaining defendants
19 there, and we have ongoing active settlement discussions with
20 the involvement of the mediators as to both defendants there.
21 So in sum, we have four total remaining defendants in three
22 parts cases.

23 THE COURT: Four defendants in three parts. Okay.

24 MR. PARKS: And one of those four defendants is
25 Takata, so that's kind of a special case.

1 THE COURT: And you are mediating or have dates
2 for --

3 MR. PARKS: We are actively involved with the
4 mediators. We -- as to one of the three defendants, putting
5 aside Takata, we have not had a mediation that I would
6 describe as a hearing but rather it was a full briefing of
7 the positions. As to the other two, we've been moving
8 forward sufficiently, I guess, in the judgment of the
9 mediators, with our sort of offers and demands process that
10 they haven't seen fit yet to schedule a mediation because the
11 conversations continue to be moving forward at a reasonable
12 pace, although we do give reports to the mediators probably
13 every two weeks or so on where things stand and whether the
14 ball continues to move forward or not, so they are actively
15 monitoring. And we are working with Jed Melnick and Simone
16 Lelchuk from Judge Weinstein's team on those.

17 THE COURT: Okay. Thank you very much.

18 MR. PARKS: You're welcome.

19 THE COURT: Thank you. Those were very good
20 reports. I also appreciate the written report. Who is doing
21 this again?

22 MR. SHEPARD: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. SHEPARD: My name is Steven Shepard with the
25 firm Susman Godfrey.

1 On behalf of end payor plaintiffs, we are grateful
2 to the Court for recent approvals of the preliminary approval
3 motions that had been filed. We know how busy the Court is,
4 and we saw that five of the seven that were outstanding were
5 entered in just the last few days.

6 We're happy to report that the round three notice
7 motion has been unopposed by the 32 round three defendants
8 who are in the motion, and we look forward to getting started
9 soon on the notice program, which, as Your Honor will have
10 seen, is closely modeled on the programs previously approved
11 by the Court for round two and round one.

12 THE COURT: Okay. You had a date of August 18th?

13 MR. SHEPARD: We had proposed the fairness hearing
14 for August 1st, Your Honor.

15 THE COURT: August 1st. Okay. Thank you.

16 MR. SHEPARD: Thank you, Your Honor.

17 THE COURT: All right. Very good. Thank you.
18 And Randall Weill?

19 MR. WEILL: Yes, Your Honor.

20 THE COURT: You've done the reports?

21 MR. WEILL: Yes, Your Honor.

22 THE COURT: Coordinated it anyway, right?

23 MR. WEILL: Coordinated, right. I think everybody
24 here has contributed immensely to putting those together so
25 it is a joint effort by all counsel.

1 THE COURT: I appreciate it. Thank you very much.
2 They are very helpful. Thank you.

3 MR. WEILL: Thank you.

4 THE COURT: I try to remember all of this but I
5 don't. Now I know I have to look at a paper before I say
6 anything to make sure I am on the right part and right
7 settlement. Okay.

8 MR. SHEPARD: Your Honor, if I may, Steve Shepard
9 again.

10 I was prompted by my co-counsel to ask to confirm
11 if August 1st would work for the Court's calendar so we could
12 plan on the fairness hearing on that date.

13 THE COURT: Let me just take a look at that.

14 MR. SHEPARD: Thank you, Your Honor.

15 THE COURT: Okay. August 1st is a Wednesday. Is
16 there any possibility -- I don't know the days -- to do it in
17 July -- wait a minute. How's July 26th, or would that not be
18 enough days -- enough time?

19 MR. SHEPARD: Let me take a moment and confer with
20 the other counsel who would like to be present, Your Honor.

21 THE COURT: Yes.

22 MS. SALZMAN: Good morning, Your Honor.
23 Hollis Salzman.

24 If it is at all possible if we could have a couple
25 of dates that would work for your schedule and then we can

1 check with the notice provider because we just want to make
2 sure that the publications and the time for the class members
3 to be noticed work with the fairness date.

4 THE COURT: Have you already verified that for
5 August 1st?

6 MS. SALZMAN: We have.

7 THE COURT: Let's keep it August 1st.

8 MS. SALZMAN: Okay. Thank you.

9 THE COURT: We will keep August 1st.

10 MS. SALZMAN: Thank you, Your Honor.

11 THE COURT: Okay. Status of scheduling orders.

12 MR. REISS: Good morning, Your Honor. Will Reiss
13 for the end payor plaintiffs.

14 THE COURT: Good morning, Mr. Reiss.

15 MR. REISS: Good morning. So approximately a month
16 ago end payor plaintiffs, in conjunction with the other
17 plaintiffs groups, began reaching out to defendants in nine
18 separate cases to start the process of scheduling the 26(f)
19 discovery conferences. We also sent each of the non-settling
20 defendants draft protective orders, a proposed discovery plan
21 and the various documents that Your Honor has reviewed and
22 ordered in numerous cases.

23 Unfortunately, to our frustration, there has been
24 quite a bit of pushback from the defendants. There has been
25 a few exceptions. But we are getting pushback that, for

1 instance, direct purchaser plaintiffs and some of the other
2 plaintiffs are in different time frames in terms of when they
3 filed their cases and some have motions to dismiss that are
4 pending. And from the perspective of end payor plaintiffs,
5 and I think automotive dealers are also on the same track as
6 we are, we very much want to move forward with these cases.
7 I know Your Honor during the last status conference urged us
8 to move forward. Typically these documents take months to
9 negotiate, and we are not even dealing with getting
10 defendants' documents.

11 So, again, we are doing everything in our power. I
12 think we have some meet and confers scheduled with some of
13 these defendants, but if we still continue to get resistance,
14 we will likely be filing motions to compel to really move
15 forward with this.

16 THE COURT: Well --

17 MASTER ESSHAKI: Did I mention I'm slow?

18 MR. REISS: Well, we heard, so we wanted to try to
19 fill your plate again.

20 THE COURT: Yeah. You need to move forward on
21 this, so why don't you do your motions to compel in the next
22 30 days if you don't get some resolution. All right. I
23 would rather that they be before the Master and have it set
24 than to be delayed any longer.

25 MR. REISS: Yes, Your Honor. We will do that.

1 Thank you.

2 THE COURT: Uh-huh.

3 MR. SPECTOR: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. SPECTOR: Eugene Spector on behalf of the
6 direct payor plaintiffs.

7 THE COURT: How are you, Mr. Spector?

8 MR. SPECTOR: Fine. Thank you, Your Honor. And
9 you?

10 THE COURT: Good.

11 MR. SPECTOR: In terms of the scheduling orders, we
12 are working with the end payors and the auto dealers to try
13 to get that done. We have a few cases where we're on our
14 own, and we are dealing with those where we now are getting
15 service. We have arbitration issues where we are getting
16 pushback on trying to schedule conferences, but we will
17 within the next 30 days get the process fully started with
18 all of those cases and see where we can move them along.

19 THE COURT: Okay.

20 MR. SPECTOR: All right.

21 THE COURT: Keep that 30 days, so we will need to
22 push the end of this to get going.

23 MR. SPECTOR: All right. We will, Your Honor.

24 THE COURT: I'm getting anxious. We are either
25 going to settle it or we are going to have a trial and start

1 something so we can see where this goes, seriously.

2 MR. SPECTOR: Fair enough.

3 THE COURT: I'm not kidding you.

4 MR. SPECTOR: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. PARKS: Your Honor, last time we were here I
7 spoke about the two cases where we are -- the truck and
8 equipment dealers were taking the lead on the scheduling
9 orders.

10 Radiators was one. That's now been resolved. That
11 scheduling order is in place. As I mentioned, we really have
12 one defendant remaining in that case in any event with active
13 settlement discussions, but that's in place.

14 The other is the starters and alternators matter.
15 We have circulated to the direct purchasers, who we believe
16 are also in that matter, a draft scheduling order. Once we
17 have their input, to the extent that they have some on that,
18 we will get that out, and our intention is to do that within
19 a week or so and get that out to the two defendants that
20 remain in that case for us. And there may be other
21 defendants in that case for the directs, I just don't know
22 yet. But we are moving forward with that, and we understand
23 it is a priority for the Court.

24 THE COURT: Good. That's good. All right. The
25 next is the date for the status conference. We have a status

1 conference filed -- schedule already for June 6th, and I
2 think you know about that. And I was thinking the next one
3 would be September 26th. September 26th, does anybody --
4 does that ring a bell to anybody? Anything else planned?

5 MR. BARRETT: Did you say the 25th or 26th?

6 THE COURT: The 26th. Now, what I have to tell you
7 is we will not be in this courtroom but I don't know where we
8 will be. They are doing, as you can see from the hallways,
9 re -- it is really the HVAC system in here that's going to be
10 redone, but the whole floor will be closed off for probably
11 the next six months. So it will be these two conferences.
12 Obviously we are well aware we need a courtroom that's
13 larger. If we can't get a courtroom, if we can't, we will be
14 down on the first floor. There is a room called the
15 Detroit Room, which is like a big conference room but I think
16 it would do fine for us, and so we will go down there. But
17 we will notify you in the next agenda. I just would like to
18 tell you so in case you don't look at the agenda, please look
19 for where you are going to come because you will not be able
20 to get on this floor.

21 MASTER ESSHAKI: Your Honor, can we just confirm
22 6/5 and 9/25 would be the Master's motion day?

23 THE COURT: Yes.

24 MASTER ESSHAKI: Thank you.

25 THE COURT: All right. Is there anything else?

1 MS. CASTILLO: Good morning, Your Honor. Elizabeth
2 Castillo for the end payor plaintiffs.

3 I believe we skipped over Section 2-C.

4 THE COURT: The update on -- yes, we did.

5 MS. Castillo: So for the end payor plaintiffs,
6 we've received all the DOJ productions from the defendants in
7 the later cases, except I would like to point out that two
8 defendants, Panasonic and Maruyasu, haven't produced their
9 DOJ productions to us. And I followed up with counsel for
10 these defendants, and they've declined to produce their DOJ
11 productions to us.

12 Panasonic, as you know, did not plead guilty with
13 respect to AC systems, but Panasonic did plead guilty with
14 respect to switches, steering angle sensors and HID ballasts.
15 So we would like the Court to order Panasonic to produce the
16 DOJ docs relating to AC systems to plaintiffs.

17 And with respect to Maruyasu, Maruyasu hasn't pled
18 guilty but it has been indicted, its U.S. subsidiary has been
19 indicted as well, and I believe four executives have been
20 indicted, so we would like Maruyasu's DOJ production.

21 THE COURT: Okay. I think we have a defendant
22 here.

23 MR. KESSLER: Good morning, Your Honor.
24 Jeffery Kessler, and I will speak for Panasonic.

25 First of all, Your Honor, I'm very surprised to

1 hear this because on this particular issue we had proposed a
2 meet and confer with the plaintiffs about this, and they have
3 yet to schedule a meet and confer, and it is very unusual to
4 have it presented not only before the meet and confer but it
5 would go to the magistrate if there was a dispute, but
6 instead we find ourselves here in open court discussing this.

7 Having said that, just so Your Honor understands
8 what the issue is, Your Honor issued an order which was very
9 clear and specific. It said that there were a group of
10 identified cases, including air conditioners, which we are
11 in, and the Court then said the following -- let me just get
12 the correct language, please. This is from page 4 of Your
13 Honor's order. The Court orders all defendants -- this is
14 paragraph 3 -- named in air-conditioning systems and then a
15 variety of other cases that have entered a guilty plea in
16 connection with the products at issue in these cases, the
17 named cases, to produce their DOJ production in those cases.

18 Panasonic's situation is it has never entered into
19 a guilty plea in any of these cases, including air
20 conditioners. What it has done is it had guilty pleas in
21 other cases for which we have previously produced years ago
22 all of our DOJ productions in those cases.

23 So we settled switches, we produced all of our
24 production in switches, we did that earlier.

25 With respect to air conditioners, we informed

1 plaintiffs we have no guilty plea and therefore there is
2 nothing for us to produce with respect to air conditioners.
3 I think we are very clearly in compliance with the Court's
4 order, but in any event, if they wish to discuss this
5 further, we should have a meet and confer, and if there is an
6 issue for the magistrate, it could be presented there, but
7 there really should be no dispute given the terms of the
8 Court's order.

9 THE COURT: Okay.

10 MR. KESSLER: Thank you.

11 THE COURT: Let me hear a response. Okay -- oops,
12 go ahead, another defendant.

13 MS. COLE: Good morning, Your Honor. Eileen Cole
14 with White and Case on behalf of Maruyasu.

15 As counsel for the EPPs pointed out, Maruyasu has
16 not pled guilty, and there has not been, according to the
17 order -- the order requires Maruyasu and other defendants to
18 produce the documents that have entered a guilty plea in
19 connection with the products at issue in the case or for
20 which there has been an announcement of such a plea agreement
21 by DOJ. Neither has occurred with respect to Maruyasu.

22 The criminal case is currently pending before
23 Judge Dlott in the Southern District of Ohio, and all of the
24 deadlines in that case have currently been stayed until
25 April 23rd.

1 Your Honor, if and when any such action should
2 occur, we certainly would produce any documents that we have
3 or have -- that we have provided to the division, but, Your
4 Honor, currently the order -- the terms in the order do not
5 apply to Maruyasu, and that's what we advised the EPP.

6 We are also similarly situated to Panasonic in that
7 there has been no meet and confer with the EPPs, and the EPPs
8 did not identify that this would be brought before Your Honor
9 instead of the magistrate.

10 Thank you, Your Honor.

11 THE COURT: I didn't know that either, but we are
12 talking about the order of October 25th, 2017 that the Court
13 entered, and on the top of page 5, after it lists all of the
14 parts, it does say those defendants that have entered a
15 guilty plea in connection with the products at issue or for
16 which there has been announcement of such a plea.

17 So let's hear your response.

18 MS. CASTILLO: So this issue previously came up
19 with -- I believe with respect to the Mitsuba and Koito
20 defendants. And we brought the issue up before Special
21 Master Esshaki, and he ruled that Mitsuba and Koito were to
22 produce their DOJ productions to plaintiffs in all cases, not
23 just the ones that they pled guilty to. So this issue has
24 come before the Special Master even if it relates to other
25 defendants, and I don't think Panasonic or Maruyasu here

1 should have an excuse not to produce these to plaintiffs.

2 With respect to --

3 THE COURT: Wait a minute. Let's stop there.

4 Mr. Esshaki?

5 MASTER ESSHAKI: Your Honor, I do not recall when I
6 made that ruling, whether it preceded or was post your order.

7 THE COURT: Okay.

8 MS. CASTILLO: It was from November of 2015.

9 THE COURT: 2016?

10 MS. CASTILLO: '15.

11 THE COURT: Oh, '15.

12 MS. CASTILLO: It was a while ago.

13 MR. KESSLER: Your Honor, there was an order three
14 years ago involving one defendant in a very specific set of
15 facts that the Special Master ruled upon. Two years later
16 Your Honor entered this specifically negotiated order. It
17 was presented to Your Honor by stipulation which specifically
18 said what was to be produced or not. That is what we are
19 complying with.

20 THE COURT: Okay.

21 MR. KESSLER: We obviously are not looking at a
22 dispute for another defendant three years ago that has
23 nothing to do with your subsequent issued order.

24 THE COURT: Here is what we are going to do. I
25 want you to do your meet and confer and I want you to do that

1 within the next 21 days, okay, so that's three weeks to give
2 you time to do it, and then I want you to file a motion
3 before Mr. Esshaki to resolve this. He can go back and look
4 at what he ordered if he believes it applies, he can look at
5 what the Court ordered a couple years later, and we will get
6 it resolved. I would like to resolve it today but I don't
7 recall that last order -- I mean the order that Mr. Esshaki
8 did, and I think we need to give you an opportunity to meet
9 and confer.

10 MS. CASTILLO: Okay.

11 MR. KESSLER: That's exactly the process we thought
12 would be followed, Your Honor. Thank you.

13 MS. COLE: Your Honor, I just would like to note
14 for the record that my understanding is that the earlier 2015
15 order dealt with a plaintiff where there was a plea agreement
16 on record or an announcement from the DOJ, and, again,
17 Maruyasu is not in that situation currently.

18 THE COURT: Okay.

19 MR. REISS: Your Honor, this is Will Reiss again
20 for the end payor plaintiffs.

21 Just for the record, Maruyasu and I had extensive
22 communications about this, and we even said that since this
23 wasn't resolved, we were going to file a motion to compel.
24 So the idea that we haven't met and spoken and addressed this
25 issue is not correct. But we are happy again to communicate

1 if there are additional issues to discuss, but it is our
2 position that we have met and conferred.

3 THE COURT: I do want you to meet and confer. As I
4 said, I think the three weeks is sufficient time to set up a
5 meeting, and after you meet and confer if you can't resolve
6 it I would say within a couple weeks, let's say two weeks
7 after, that you file a motion, and then Mr. Esshaki will set
8 it for a hearing.

9 MS. COLE: Thank you, Your Honor.

10 MR. KESSLER: Thank you, Your Honor.

11 THE COURT: Okay. Counsel?

12 MR. WEILL: Your Honor, Randall Weill again. Good
13 morning.

14 On behalf of direct purchasers, this is more of a
15 Greenshade report and request about this order that you
16 entered. We have looked at the --

17 THE COURT: We are talking about the October --

18 MR. WEILL: The October order that you entered. It
19 listed the cases that are in the agenda.

20 THE COURT: Yes.

21 MR. WEILL: We've looked it over and found that
22 there were some cases that the direct purchasers were not
23 part of at the time that the Court entered the order. So
24 going through it and trying to figure out the status, what we
25 wanted to do was to ask the Court if it were possible, and

1 certainly the defendants could comment, to allow the direct
2 purchasers to be included with respect to the alternators
3 case and the starters case because those I believe were
4 limited to the truck dealer cases.

5 There are some other cases that are subject to the
6 order that direct purchasers are going to pursue once we've
7 had an opportunity to have service conducted, and we are not
8 asking for -- you know, we are not saying there is a dispute
9 of any kind, but we will pursue that. But we did also note
10 that there are some cases that not are listed in this report
11 that we would ask to be added, and let me identify those, and
12 to the extent I have listed cases for which productions have
13 already been made by guilty plea parties and we received
14 them, I apologize, but let me list them.

15 For anti-vibration rubber parts, I know that
16 Bridgestone and Toyo Tire pled guilty. For ignition coils,
17 Diamond Electric pled guilty. For power window motors,
18 Mitsuba pled guilty. For switches, Panasonic and Omron plead
19 guilty. And for valve timing control devices, Aisin Seiki
20 pled guilty.

21 And all we are saying is that if it is possible if
22 we could propose an order we would circulate to the
23 defendants that simply supplements what you issued in October
24 so that it includes the direct purchasers and some cases
25 where there are guilty pleas but we don't think there have

1 been any productions made. And if defendants indicate no,
2 no, we've done this, then that's fine, we can sort that out.

3 THE COURT: Why don't you submit a proposed order
4 to amend this order to add these defendants, and then the
5 defendants can agree, object or whatever, and we will deal
6 with that. If they do, then that would go before the Master
7 also in the timely fashion as the others.

8 MR. WEILL: Thank you very much, Your Honor.

9 THE COURT: Thank you for bringing that up.
10 Anything else on this October order?

11 (No response.)

12 THE COURT: No. All right. Our next item is the
13 motion hearing. Mr. Esshaki, you are free to stay but you
14 are also free to leave.

15 MASTER ESSHAKI: Thank you very much, Your Honor.
16 It is good it see you.

17 MR. WEILL: Your Honor, could we have a couple
18 minutes to set up and also to talk to defense counsel for a
19 moment?

20 THE COURT: Yeah. We can take a five-minute break.

21 MR. WEILL: Thank you.

22 THE COURT: We will just resume in five minutes.

23 THE LAW CLERK: All rise. Court is in recess.

24 (Court recessed at 10:37 a.m.)

25

— — —

1 (Court reconvened at 10:45 a.m.; Court and Counsel
2 present.)

3 THE LAW CLERK: All rise. Court is again in
4 session. You may be seated.

5 THE COURT: Okay. This is the direct purchaser
6 plaintiffs' motion to exclude portions of the expert report
7 and opinions of Mr. McCloskey.

8 MR. WEILL: Randall Weill, this time arguing on
9 behalf of direct purchaser plaintiffs.

10 If I may approach the bench, I have a copy of a
11 couple -- of a single PowerPoint.

12 THE COURT: All right.

13 MR. WEILL: Sometimes PowerPoints aren't as legible
14 or responsive as I would hope.

15 THE COURT: I had indicated to -- somebody had
16 asked me if anybody wanted to leave if you are not involved
17 in the motions, and you can feel free to leave or stay.
18 Okay.

19 Mr. Weill.

20 MR. WEILL: First, thank you very much, Your Honor,
21 for hearing argument on this motion. I think it is -- it
22 presents some important issues and I look forward for the
23 opportunity to explain what our views are with respect to
24 Mr. McCloskey's testimony.

25 Nate, could you put up the second slide, please.

1 So if we go to page 2 of the handout, Your Honor,
2 it is a recitation from Scrap Metals of the Daubert framework
3 and legal standard that I know the Court is very familiar
4 with this. I just put this up here to start to talk about
5 Mr. McCloskey's experience, and so sort of set that in the
6 framework of what we are talking about.

7 I think as the Court is aware, when we talk about
8 his qualifications, it -- the Scrap Metals court says it
9 requires knowledge, skill, experience, training or education.

10 So we know Mr. McCloskey spent his career in the
11 industrial distribution field. His employers have been
12 involved in industrial distribution extensively. When he
13 left his most recent employer, Command Industries, he started
14 a consulting business, and he self-describes his consulting
15 expertise as in the, quote, industrial distribution space,
16 closed quote.

17 So that's I think important when we talk about
18 automotive bearings and his opinions about automotive
19 bearings. He doesn't say he's consulting or offering his
20 expertise with respect to automotive bearings. For that
21 matter, he doesn't say he's offering his expertise with
22 respect to the manufacture of bearings.

23 I would also note that Mr. McCloskey in his
24 declaration appended what I think is a pamphlet in
25 attachment 4 from the Bearing Specialists Association that

1 describes a program that the Bearing Specialists Association
2 sponsors through I believe Southern Illinois University for
3 individuals to become verified bearing specialists.

4 Again, Mr. McCloskey indicates he's not a certified
5 bearings specialist, and so that I think informs us of -- at
6 least from our perspective, it informs the nature of his
7 testimony.

8 Finally, Mr. McCloskey has never testified as an
9 expert before so we don't have a track record of his being
10 qualified as an expert in a court proceeding or to look at
11 what his expertise was deemed as qualifying for purposes of
12 testimony. So that piece is missing as well.

13 So I would like to move on then to the automotive
14 bearing piece of our argument, which, as the Court knows, is
15 the -- what we feel is the very significant issue for us. If
16 I could start with putting a little perspective on the
17 automotive bearing field.

18 If you could go to the next slide, you will see
19 page 3 is the first page of the deposition testimony of a
20 Dina Gehlke [sic] at McGuire Bearings.

21 And could you go to the next page, please.

22 And this McGuire Bearings, as the Court knows, is
23 one of the class representatives in the case, and at her
24 deposition she testified, if you go to page 4, can you tell
25 me the types of bearings that McGuire sells?

1 And she responded, we sell ball bearings, we sell
2 roller bearings, automotive bearings, mounted bearings, and
3 continues as to the type of bearings they sell.

4 On the next page she said -- the question is, you
5 mentioned automotive bearings. What are you referring to
6 when you say automotive bearings?

7 Bearings used in autos.

8 And then down lower in the page, when I say
9 automotive bearings, a lot of manufacturers designate those
10 bearings in their catalogues as automotive bearings.

11 You go to the next slide, the first page of the
12 deposition of Mr. Steven McGuire at McGuire Bearings. If you
13 go to page 70, the next page there, you will see on page 71
14 he responds to similar questions as to the types of bearings
15 that are sold by McGuire, which include many different kinds:
16 tapered roller bearings, ball bearings, also auto bearings.
17 And he continues to say you can't look at a bearing and say,
18 oh, this is an automotive bearing or this is an industrial
19 bearing because most bearings that are used in automobiles
20 are also used in other things.

21 And then he goes on in the next page, on page 8, to
22 say in response to a question about dimensions, he says it is
23 very -- let me read the question. And would the size and
24 dimensions of the tapered roller bearing used for the
25 automobile be the same size and dimensions for the one used

1 for the speed reducer?

2 Yes, it very much could because these are our
3 standard parts where the standards have been set for a long
4 time, and multiple manufacturers manufacture the part and
5 normally there are just a lot of crossover between the two.

6 So in that context we obviously have a distributor
7 who sells industrial bearings but also automotive bearings.
8 We know that the defendants sell all types of bearings,
9 industrial bearings and automotive bearings. In fact,
10 although there's some reference to the uniqueness of
11 customized bearings insofar as they relate to automobiles, if
12 you can turn the page, you will see here, this is one of the
13 exhibits from Mr. McCloskey's deposition, number 4256, this
14 is a little ad from SKF, one of the defendants, that is
15 obviously geared toward the replacement aspect of wheel hub
16 bearings. Wheel hub bearings are for automobiles. They are
17 a customized bearing for automotive use, but they aren't
18 unique bearings because they are -- they are available,
19 readily available.

20 And obviously if -- I have a 2007 Ford 500, great
21 car, but if I need a wheel bearing, I don't need to go to
22 Ford to get it. I can get that wheel bearing, and SKF says
23 here on page 10, touting its expertise, our premium quality
24 hub bearings are manufactured using high-quality steel and
25 surface finishes, premiums seals, OE sensors, precision

1 manufacturing techniques, precise assembly balances. Every
2 SKF premium hub is 100 percent tested to the actual OE
3 specifications per part number for fit, form and function,
4 and that means it will fit correctly and work correctly and
5 last as long as the original hub that came with the car when
6 it was new.

7 So clearly industrial and automotive bearings share
8 a supply chain commonality from both the defendants and the
9 distributors. In fact, Mr. McCloskey indirectly confirms
10 that because in his testimony he talks about his expertise
11 because he served on a distributors' advisory council that
12 was put together by NTN. It turns out this was a
13 distributors' advisory council for industrial bearings. We
14 will get to that in a minute.

15 It turns out Mr. McCloskey says, well, there also
16 was an NTN distributor advisory council for automotive
17 bearings. I didn't serve on that council but Command, his
18 employer, was a participant with NTN, and it just reinforces
19 this commonality of these bearings and their availability.

20 So turning to Mr. McCloskey. As we have mentioned
21 in our submissions, Mr. McCloskey has no training in the sale
22 of auto bearings, he never sold an auto bearing, he never
23 responded to an RFQ for an automotive bearing.
24 Interestingly, he was aware of such an RFQ coming to him from
25 an automobile source manufacturer, apparently to Command, an

1 industrial distributor, for bearings. It turned out that it
2 didn't go anywhere because they felt they couldn't respond
3 adequately, but the idea -- that idea that automotive
4 manufacturers will send an RFQ to an industrial distributor
5 speaks, in our view, volumes about the nature of bearings and
6 their uses, and they can be standardized bearings, they can
7 be customized bearings, but they can be had from all sources,
8 including distributors and certainly from all of the
9 defendants.

10 Now, we get to the bottom of Mr. McCloskey's
11 expertise I think with his testimony that says -- if we could
12 go to page 12 which is an excerpt from his testimony where he
13 says in response to a question -- the question: So the
14 extent of your knowledge is that automotive OEMs use RFQs; is
15 that correct? He says yes.

16 So we feel that Mr. McCloskey -- Mr. McCloskey's
17 experience is non-existent with respect to automotive
18 bearings, and that's the reason that we requested that those
19 portions of his declaration that relate to opinions about
20 automotive bearings should not be permitted to -- should not
21 be admitted because they simply aren't reliable because they
22 are not based on knowledge or experience.

23 Turning to manufacturing, Mr. McCloskey's
24 declaration contains numerous references to manufacturing and
25 the implications of manufacturing and what appears to -- he

1 appears to state the -- are the differences or the
2 difficulties manufacturing different types of bearings, yet
3 Mr. McCloskey was never involved in the manufacture of
4 bearings. His knowledge on manufacturing appears to be based
5 solely on visits to NTN plants, most recent some five years
6 ago. It's clear he has no access, had no access to any
7 internal financials of the manufacturers, so he has no
8 knowledge of how those -- what those costs are. For example,
9 he doesn't know how they are allocated so he doesn't know
10 anything about how you amortize or price or allocate costs
11 for materials or tooling or labor or the treatments for
12 bearings or inventory compliance. He simply doesn't have
13 that kind of background to offer those kinds of opinions.

14 With respect to markets, this is more specified in
15 terms of our concerns. There are a couple of instances
16 where, first of all, Mr. McCloskey's experience appears to be
17 more generalized in nature, but, for example, when he talks
18 about Timken, he offers no basis for an opinion about the
19 majority of bearings that Timken sold are X, but he never
20 worked with Timken. He may have knowledge about what Command
21 purchased from Timken, but that doesn't speak to what
22 Timken's experience is. So we don't feel that -- and he
23 didn't look at any Timken data. So that very narrow
24 perspective on what Command's experience with Timken is we
25 don't think serves as an adequate support for a broad

1 statement about what Timken, the nature of Timken's business
2 is.

3 Similarly, with respect to Chinese imports, he was
4 asked but gave no support or sources for his statements about
5 the percentages of bearings that were imported from China
6 over this time period. Most significantly, he offers no
7 opinions or knowledge about what kind of bearings they were.
8 Were they high-quality bearings, which the defendants
9 certainly specialize in? I -- and this is perhaps not the
10 best analogy, but I can think of needing a tool for some
11 purpose at my home, and depending on what it is, if I want
12 something cheap just to get the job done once, I might go to
13 Harbor Freight and I will get something that is made in China
14 and it is okay. But if I want something to work on my
15 automobile, I would go to Sears and I would get a Craftsman
16 tool to do it because I know that's going to be reliable.

17 So there is a big distinction in terms of quality
18 in that respect that I think that analogy suggests is
19 important as well with respect to any discussions about
20 bearings that are imported from China. Where Mr. McCloskey
21 cannot even tell us where he got this information, we would
22 ask that that data be stricken from his declaration.

23 Next, with respect to substitutions, this -- these
24 opinions in Mr. McCloskey's declaration appear to be used to
25 support a proposition by defendants that there has to be some

1 kind of Precambrian bearing that's used as a benchmark for
2 all other bearings, and that if you have a notion of what the
3 price is for this Proto bearing, then that's the only way you
4 can tell an impact of price fixing on all other bearings.
5 That's not the direct purchasers' position and far from it.

6 We believe firmly that there are many types of
7 bearings. As Mr. Kessler said at the class certification
8 hearing, they can be as small as a grain of rice, they could
9 be in a wristwatch, or they could be in a windmill or I think
10 his example was a Ferris wheel. But those have to -- those
11 issues have to deal with the different sizes that are used
12 for a particular function, and that does not have anything to
13 say about what types of bearings are available from whom for
14 any particular source, and that goes to the heart of whether
15 a defendant or any of the defendants can make that bearing
16 for the Ferris wheel or the bearing for the wristwatch. And
17 that's where the substitutions come down to the question of
18 are bearings -- is it possible to substitute bearings.

19 Now, Mr. McCloskey, if we go to page 14, this is
20 Mr. McCloskey's declaration, at paragraph 13, he says in the
21 highlighted portion, for the majority of applications,
22 however, bearings simply are not interchangeable, meaning that
23 a buyer is unable to substitute one bearing for another
24 without the possibility of undesired changes in performances
25 and liability exposure.

1 Well, we have already seen as example the SKF
2 brochure with the little child in a baby seat saying we can
3 make a customized hub bearing that's going to protect your
4 child just the same as that original OEM part.

5 We believe Mr. -- in particular, that paragraph 13
6 statement by Mr. McCloskey is not reliable for a number of
7 reasons, including what we already described as his lack of
8 knowledge of manufacturing, so he can't really speak to the
9 capability of the defendants to produce a particular bearing
10 for a particular use. He, as mentioned, is not familiar with
11 the term form, fit or function, was not apparently. But it
12 is certainly used as a way to describe how bearings can be
13 used in different places. He's never, as he testified,
14 worked with customers to decide an appropriate substitute
15 bearing, and as I mentioned at the beginning, he's not a
16 certified bearing specialist.

17 And I mentioned that attachment 4. If you go to
18 page 15 of the handout, we will look at attachment or
19 appendix 4 to Mr. McCloskey's declaration, and this is the
20 brochure I mentioned. And if we look on the first page, it
21 says in the highlighted portion the program is designed to
22 certify industry personnel as bearing specialists,
23 individuals with excellent knowledge in the selection,
24 application and analysis of bearings.

25 If you go to the next page, it has a description of

1 the skill sets that are performed by bearing specialists,
2 among them in the highlighting, of course, is the
3 recommending interchanges and substitutions, identifying
4 bearing type, application source, and manufacture, verifying
5 bearing dimensions, match part numbers, justifying change to
6 alternate bearings based on availability, service life and
7 cost.

8 So I'm not saying that Mr. McCloskey has to be a
9 bearing certified -- a certified bearing specialist to
10 testify about bearings if he has the appropriate experience,
11 which he doesn't have. But it is clear that someone who has
12 knowledge of bearings and is certified as such is well versed
13 in the adaptability of bearings for different uses and the
14 substitution of those bearings and the interchangeability of
15 those bearings. And this is something that Mr. McCloskey
16 provided in connection -- in support of his declaration.

17 Next, Mr. McCloskey has a statement in his
18 declaration, if we could go to page 18, that I found rather
19 remarkable in that it is -- it's easy to overlook, but it
20 says that in this report the term performance will refer to a
21 bearing's ability to meet or exceed a buyer's expectation of
22 acceptable operating life.

23 Now, if this is the standard for someone who is
24 familiar with the bearings -- the substitution of bearings,
25 there is no expertise involved because the customer is the

1 expert, not the bearings specialist, certainly not the
2 certified bearings specialist. This definition, in our view,
3 is not -- it's not a methodology, it's not scientific, it's
4 not reliable because it simply says I will give the customer
5 whatever he wants, and if it doesn't work, it's not my
6 problem. He's not offering any expertise in that
7 conclusion -- in that definition.

8 And I will point out that that definition of
9 performance, although it appears in paragraph 19 and other
10 paragraphs, and I will name the paragraphs, 13, 27 and 33
11 through 36, you'll find that the term performance is used but
12 in its regular sense, not in the sense of what a customer
13 thinks about it but how it actually performs in usage to
14 determine whether a particular bearing is appropriate for
15 that particular use.

16 So we feel that that odd definition of performance,
17 in abnegation of any expertise in that respect, is, in
18 conjunction with his inexperience in actually working through
19 substitutions, a very telling aspect of his testimony that
20 suggests he should not be able to talk about substitutions or
21 to say that the vast majority of applications are not
22 interchangeable.

23 In fact, and this is the part I find most
24 interesting, if we look at the references Mr. McCloskey cites
25 in the I think appendix 2 of his declaration, he's got a list

1 of citations. He was asked what are these documents, and he
2 says these are reliable documents from manufacturers, and I
3 rely on -- I would rely on these documents, these are
4 reliable documents.

5 So I looked through these documents, and if we
6 start -- because you don't get a sense of them, let me pull
7 them to show you what we are talking about here.

8 So if we could start with page 19. So page 19 is
9 the first page of a document that's call SKF Bearings Master
10 Interchange. And if we turn to the second page, you will see
11 there on page 20 a little statement that says this catalogue
12 is presented in a simple to use sequence similar to a
13 dictionary listing. So it is -- to me it is like a telephone
14 book. If I know a particular bearing, and they have a list
15 of abbreviations at the beginning that show that some 400
16 types of bearings that are listed here so I can go to that
17 particular bearing, a Koyo bearing, and then I go next to the
18 Koyo bearing and there is the SKF equivalent.

19 So this is one example of how the defendants spend
20 considerable resources explaining how their bearings can be
21 used to replace other bearings -- other manufacturers'
22 bearings. In fact, at the bottom of page 20 -- on the bottom
23 of page 20 it says, note, interchanges listed here will
24 provide a fast conversion of manufacturer or competitor
25 numbers to the SKF equivalent.

1 So that is pretty much it. The dictionary provides
2 a fast conversion. It is a tool that certainly someone
3 familiar with bearings would be able to use.

4 So then we -- I will go to the next reference.
5 This is a little heftier. This is another SKF reference, and
6 this takes a little more time to go through but --

7 THE COURT: I'm glad you are not submitting those
8 into evidence.

9 MR. WEILL: I thought the Court might appreciate
10 that, but you have to enjoy, you know, this looks official.

11 Anyhow, if we go to page 22, I'm guessing, yes, we
12 will see here an interesting statement that says as far as
13 SKF is concerned, experience has shown that the requirements
14 of the vast majority of bearing applications can be met using
15 bearings with these standardized dimensions.

16 So here is a document that Mr. McCloskey relies on,
17 and it says pretty specifically something that appears to be
18 directly a contrast of his statement that the vast majority
19 of applications are not interchangeable, but that's not all.
20 That's SKF.

21 We move on to NTN, another defendant, page 23, ball
22 and roller bearings, another reference source.

23 If we go to slide 24, we have a statement or a
24 couple of statements that I find very interesting. It talks
25 about the characteristics of rolling bearings, and it says

1 rolling bearings come in many shapes and variables, each with
2 its own distinctive feature. However, when compared with
3 sliding bearings, those are like plain bearings that just go
4 on the edge of a shaft and that don't have balls or rollers.
5 Rolling bearings have the following advantages. And I've
6 highlighted item 2 because I thought that most interesting.
7 They are internationally standardized, interchangeable and
8 readily obtainable.

9 Now, that's significant because of what the
10 statement on -- the next highlight statement says at
11 paragraph 1.3.4. It says the boundary dimensions and shapes
12 of bearings conforming to international standards are
13 interchangeable and can be easily -- obtained easily and
14 economically over the world over -- over the world over. It
15 is therefore better to design mechanical equipment to use
16 standard bearings.

17 Now, I thought that was interesting because if we
18 go to slide 25, we have a snapshot of a page from the
19 Command -- a Command website, Command being Mr. McCloskey's
20 employer for some ten years where he was, I believe, a senior
21 vice president, and it says a number of things about his
22 business. But the one I thought most interesting was at the
23 bottom of the page, which is underlined in red, which says,
24 in extract, our core business lies in the supply and
25 application of standard components. So in contrast to the

1 idea that there are a vast majority of applications that are
2 not interchangeable, Mr. McCloskey's own employer prided
3 itself on providing its customers the ability to use
4 bearings, standard bearings in order to ensure that its
5 business -- that they could offer value to its customers and
6 reduce their costs.

7 Now, finally another document that Mr. McCloskey
8 cites is an NSK document, and if we turn to page 26, there
9 you go, there's the cover page. If we turn to page 27 and
10 then 28, I highlighted in the table of contents where the
11 catalogue shows for each of the type of bearings that there
12 are interchanges for those bearings that are provided by NSK.
13 So, for example, ball bearings, and we talk about single row
14 deep groove ball bearings. Well, the interchange is on
15 page B2. For double row angular contact ball bearings, the
16 interchange is on page B24, and so on. It goes into
17 cylindrical roller bearings, spherical roller bearings,
18 tapered roller bearings, as the Court can see.

19 And then if we go to page 29, and I thought this
20 was perhaps the most interesting part of this catalogue, and
21 it is a flow chart. And if the Court were to look at this --
22 if we start, for example, at the top, it says -- my copy is
23 hard to read so I'm going to go to the catalogue here. At
24 the top it says extract failed bearing. Question one, does
25 the bearing have a destination? No. So you go to the right

1 and it says, determining the basic bearing type, ball,
2 roller, et cetera. Measure the basics, and then go to NSK
3 and ask for a quote. Obtain the bearing once you have the
4 quote. And then at bottom it says fit new NSK bearing.

5 Well, if we go back to the top of the flow chart
6 and we ask does the bearing have a designation, you say yes.
7 Does it have an NSK reference? Let's say yes. We go to the
8 left, it says get a quote at. And at the bottom it says the
9 same thing, fit new NSK bearing.

10 Well, if it doesn't have an NSK reference, you
11 identify the bearing designation. Does the designation have
12 an interchange in this section of the book? If it does, you
13 find it, the bottom result, fit new NSK bearing. If it
14 doesn't have a designation on the interchange, it says
15 consult the NSK -- an NSK authorized distributor, and then
16 you are going to get a quote from NSK and it is going to
17 result in fitting the new NSK bearing.

18 So, you know, these documents that Mr. McCloskey
19 put together clearly indicate that the statement -- that a
20 vast majority of applications are not interchangeable is not a
21 reliable statement.

22 If we could go to the last page, that brings us to
23 where we feel that the Scrap Metal court tells us that
24 Mr. McCloskey cannot either provide -- that his testimony is
25 based on sufficient facts or data or uses reliable principles

1 and methods, and whether -- and it doesn't show he's applied
2 those principles and methods reliably to the facts of the
3 case.

4 And for those reasons, Your Honor, we submit that
5 we believe Mr. McCloskey's testimony with respect to the
6 topics we have described, not all of the topics in his
7 declaration but with respect to those topics is not
8 admissible, it is not reliable, and therefore should not be
9 permitted.

10 THE COURT: All right.

11 MR. WEILL: Thank you very much, Your Honor.

12 THE COURT: Thank you. Response?

13 MR. PALFIN: Your Honor, Keith Palfin from Winston
14 & Straun for the JTEKT defendants, and I will be arguing on
15 behalf all of defendants.

16 We might just need a minute to get the slides set
17 up.

18 Your Honor, I have some hard copies, if I may
19 approach.

20 THE COURT: All right. Thank you.

21 MR. PALFIN: If we can go to the first slide. My
22 apologies, Your Honor. I think we are having some technical
23 difficulties.

24 Your Honor, the experience that Mr. McCloskey has
25 accumulated in his 40 years in the bearings industry renders

1 him well qualified to testify on all of the topics in his
2 report, and that is especially the case because his
3 testimony, his report consists of basic industry facts, and
4 those facts are corroborated by the record in this action as
5 I will show in subsequent slides.

6 And the courts are crystal clear, particularly in
7 the Sixth Circuit, that where you have an expert who has
8 relevant expertise that challenges like plaintiffs to the
9 breadth of that expertise go to the weight the factfinder
10 gives to his testimony, not to its admissibility.

11 So if we go to the next slide. And so here is the
12 basic standard for measuring expert testimony: it has to be
13 relevant and reliable. I think that's undisputed so I am
14 just going to go to the next slide.

15 So the question here, because they are challenging
16 his qualifications and they are solely challenging therefore
17 the reliability of his testimony, the question is how do you
18 assess the reliability of a non-scientific expert testimony
19 that reflects a person from the industry sort of laying out
20 basic facts about the industry? And courts have held that
21 under those circumstances the reliability inquiry doesn't
22 focus on some of the more technical scientific Daubert
23 elements such as, you know, applying principles and methods
24 to facts, but you focus on the expert's knowledge or
25 experience. It is very simple, very direct, you know, does

1 he have a basis in his background for providing this
2 testimony?

3 And in the quote on the bottom of that slide you
4 have the Sixth Circuit finding that the testimony from an
5 expert in the banking industry was reliable based on the
6 expert's practical experiences with 40 years in that
7 industry.

8 And that -- that First Tennessee Bank case, the
9 Sixth Circuit case we are quoting there, is a useful case
10 here because it involved a very similar argument to the ones
11 that plaintiffs are making. The opposing party in this case
12 argued that this banking industry expert, who has spent
13 40 years in the banking industry, did not have sufficient
14 experience with a particular aspect of the banking industry
15 that was relevant to the case. And what the court held, and
16 you can see this on the next slide, the Sixth Circuit held
17 that the extent that this banking expert may have lacked
18 familiarity with some aspects of the industry, the district
19 court correctly reasoned that such unfamiliarity merely
20 affect the weight and credibility of his testimony, not its
21 admissibility. And we think that principle should be applied
22 here and should result in denial of plaintiffs' motion.

23 So if we go to the next slide. So I think the
24 appropriate starting point in assessing Mr. McCloskey's
25 testimony is to look very specifically at what testimony is

1 being challenged. Here you have -- on the left you have a
2 list of the topics that plaintiffs identified in their brief
3 that they were challenging, and on the right you have topics
4 that they are not challenging.

5 And I think there are two key takeaways from this
6 slide. The first is that Mr. McCloskey is an undisputed
7 expert on many facets of the bearing industry. Many topics
8 addressed in his report plaintiffs don't challenge his
9 qualifications to testify to those matters.

10 And I think the second takeaway is that the
11 categories -- so those are on the left, those are just taken
12 straight from plaintiffs' briefs -- that those categories
13 aren't really entirely accurate with respect to the testimony
14 that is being challenged. So, for example, in the briefs
15 they say they are challenging his testimony on bearings
16 markets, but if you actually look at specifically what they
17 are challenging, they don't challenge his qualifications to
18 testify with respect to the industrial OEM bearings market,
19 they don't challenge his qualifications to testify with
20 respect to the industrial aftermarket for bearings, you know,
21 which would fall under the categories of bearing market.

22 So to understand, you know, what testimony is at
23 issue, you have to look at the exhibit to their motion, and
24 that's -- we will take a look at the excerpt. This is an
25 excerpt of the exhibit to plaintiffs' motion where they

1 identify specifically the testimony that they are
2 challenging, and they do that by crossing out the language
3 that they are asking this Court to strike from -- from
4 Mr. McCloskey's report. And this excerpt I think again
5 illustrates the breadth of Mr. McCloskey's -- undisputed
6 breadth of his experience. Plaintiffs don't dispute that
7 he's qualified to testify about bearings fundamentals, the
8 characteristics, designs, applications, customers, sales in
9 the U.S., procurement, pricing or inventory management, but
10 they challenge in this paragraph his ability to testify to
11 manufacturing competitors and markets.

12 And I think the Sixth Circuit cases we have cited
13 before, you know, when you are here, when you are at this
14 point, when your undisputed expert on so many facets of the
15 industry and you are challenging his qualifications with
16 respect to a few areas, that goes to weight, not
17 admissibility. Your Honor is perfectly capable of taking
18 their arguments, which they went on at length about, you
19 know, why his testimony is wrong and the nature of his
20 qualifications in various areas and applying the appropriate
21 weight to his testimony. And that's what the Sixth Circuit
22 says is the right result with this sort of challenge.

23 So if we go to the next slide. So this is another
24 excerpt from the exhibit to the motion where they are
25 identifying what they are challenging. And here again, you

1 know, undisputed expert in industrial markets, on the
2 industrial aftermarket, but they challenge his ability to
3 testify about the automotive market and the automotive
4 aftermarket.

5 Now, I think it bears noting that the notion that
6 this person who spent 40 years, you know, in this industry to
7 the point where he's an undisputed expert in the industrial
8 and industrial aftermarket, but plaintiffs say he's not -- he
9 can't testify to the basic facts he has in his report on the
10 automotive, automotive aftermarket, you know, an essential
11 premise of that argument is that the different markets for
12 bearings have highly differentiated features. And with
13 respect to that aspect of plaintiffs' argument, they are
14 right, the markets are highly differentiated. They are --
15 the purchasers buy bearings in different ways, they buy
16 different bearings. They, you know, for example, in the
17 automotive OEMs, will generally purchase customized bearings
18 through a heavily negotiated RFQ process, whereas industrial
19 aftermarket distributors will purchase standard catalogue
20 bearings off of price lists typically with no negotiations.
21 So there's very different purchasing behavior results in very
22 different pricing and have very different, just very
23 different market dynamics in the different markets, in the
24 different bearings markets.

25 And, you know, the impact of that is, you know,

1 these differences in the markets require, as we explained
2 last time, and I'm not going to go on -- I'm not going to
3 repeat myself, repeat what we discussed last time too much,
4 but really the differences require individualized inquiries
5 to assess any impact from the alleged conspiracy here, and
6 that, you know, the market differences, which, you know, are
7 an essential premise of plaintiffs' argument here really show
8 that the one-size-fits-all single aggregate overcharge
9 approach that plaintiffs have offered for showing impact here
10 just doesn't fit, it is not a reliable way of showing common
11 impact, especially given the failure of Dr. McClave to
12 account for those very important meaningful differences
13 between the markets.

14 So the question then, coming back to the present
15 motion, given the markets are so very different, automotive
16 and industrial, how can Mr. McCloskey testify about the
17 automotive market when he spent his career -- he spent his
18 career in the industrial aftermarket, and the answer to that
19 question is two-fold. First, his testimony consists of basic
20 industry facts about the automotive markets, about --
21 everything in his report is -- just puts in one place just
22 the basic contours of the bearings industry. And a person
23 who spends -- a businessman who spends 40 years of his life
24 in the industrial aftermarket will naturally learn the basic
25 features of related bearings markets. That's exactly what

1 happened here. When we get to Mr. McCloskey's experience, we
2 will show he has the experience to -- the background to
3 testify reliably on those subjects.

4 So here are some examples of the challenged
5 testimony. So he testifies that automotive industrial
6 bearing markets are distinct. He testifies that automotive
7 OEMs are large companies, that the OEMs use RFQs and
8 multi-year contracts, and that's different from how bearings
9 are purchased in the industrial aftermarket. That automotive
10 distributors purchase catalogue bearings at list prices. So
11 these are just examples, but if you look at his report, it is
12 all basic industry facts. You wouldn't need the 40 years of
13 experience that he has to testify reliably on those subjects.

14 And further, all of those facts are corroborated by
15 the record. So, you know, we have on the right just examples
16 from the record that support each those principles, and you
17 could do the same thing for his entire report. It is basic
18 industry facts corroborated by the record. Mr. McCloskey,
19 the purpose of his report is to just put basic facts about
20 the industry in one place, you know, in one organized place,
21 as opposed to those facts being scattered throughout the
22 record, but he doesn't bring anything sort of new or
23 different or something that is not established already by the
24 record the case, so it is, you know, basic facts corroborated
25 by the record.

1 Let's go to the next slide.

2 In particular, his testimony about
3 interchangeability. Now, Mr. Weill relied on a number of
4 documents, well, to -- you know, to challenge Mr. McCloskey's
5 testimony regarding interchangeability. Mr. McCloskey's
6 testimony, the thrust of his testimony is that bearings are
7 not interchangeable generally, and that is corroborated, first
8 of all, by plaintiffs' own industry expert. They submitted
9 an expert from John Farmer. He testified at a deposition,
10 and he testified and he agreed with the proposition that
11 different types of bearings are generally not interchangeable.
12 So there's no meaningful dispute between Mr. McCloskey and
13 Mr. Farmer, plaintiffs' expert, on this issue.

14 Now, the interchange guides and the other documents
15 that Mr. Weill brought to the Court's attention do not
16 establish otherwise, and I will give you a few examples. So
17 Mr. Weill quoted this SKF product guide, and he had the first
18 two pages and then the third page was omitted. And he used
19 the first two pages to try to show that, you know, bearings
20 are just -- a bearing is a bearing, you can just interchange
21 it at will. And the third page shows that's not the case,
22 and the third page corroborates further Mr. McCloskey's
23 testimony that you have to take into account performance
24 characteristics. Even if you have two bearings that are
25 dimensionally identical, you to take into account performance

1 characteristics.

2 So this guide that Mr. Weill relied on, the next
3 page that was not in his presentation, has a Q and A section.
4 For example, it says, question: Why are value grade hub
5 units a risky choice? Answer: Many manufacturers sell
6 replacement hub bearings that are very low priced. Initially
7 you may think that's a great deal or value. Unfortunately,
8 with that low price you get a low quality hub bearing that is
9 inferior to a premium original equipment quality hub bearing.

10 And then the document continues on to identify the
11 potential problems with putting in, again, a dimensionally
12 identical bearing that has very different performance
13 characteristics. It says those value grade hub units can
14 last less than half as long as a premium unit. Their cheaply
15 made seals can allow moisture and contaminants to enter and
16 destroy the bearing prematurely. They can produce annoying
17 wheel vibration and noise. They can cause your anti-lock
18 braking systems to malfunction. So all sorts of reasons why
19 you need to assess the performance of a bearing, even if it
20 is dimensionally identical, to determine if it is a suitable
21 substitute. And that's the basic thrust of Mr. McCloskey's
22 testimony.

23 And with the interchange -- and to address the
24 interchange guides, those phonebooks that Mr. Weill's
25 referenced, those guides show -- you know, they are

1 phonebooks, and what they do is they identify bearings that
2 are dimensionally identical or similar to each other that
3 could potentially be replacements. But what those -- what
4 those guides tell you is not that bearings are generally
5 interchangeable. They reinforce the conclusion, which is the
6 basis for our class certification arguments in this case,
7 that they are not because those phonebooks will list one
8 bearing and it will list maybe one, two, three others that
9 are dimensionally identical and potential substitutes. The
10 rest of the phonebook are bearings that are not substitutes.
11 So any one of these phonebooks will list thousands and
12 thousands of bearings, and for any one there might be one or
13 two, three substitutes. Most are not.

14 And that is the point. It is the diversity, it is
15 the variety of bearings. It is -- and again, the lack of
16 interchangeability also established by plaintiffs' expert
17 when he says bearings of different sizes cannot be
18 substituted for each other, and I think the picture
19 establishes that as well. And you know, again, there --
20 plaintiffs' expert, bearings have numerous different
21 characteristics, that's what those interchange guides are
22 telling you, numerous different characteristics.

23 And also by the way, almost all of those guides
24 contain, you know, some equivalent of a warning saying to the
25 effect of, you know, you can't just throw in a dimension

1 identical bearing that we are saying is a potential
2 substitute. You have got to be careful and look at your
3 application, you've got to look at performance issues.

4 So, for example, on slide 24 of Mr. Weill's
5 presentation below the highlighted part that he had read, it
6 says, however, depending on the type of machine they are to
7 be used in and the expected application and function, a
8 nonstandard or specially designed bearing may be best to use.
9 And so that's just one example. I have seen these warnings
10 in various different ways in these interchange guides.

11 But it really sort of takes away from the main
12 point that there is just massive diversity, massive variety
13 of bearings with tons of different characteristics, and just
14 more examples here, all from plaintiffs' expert, plaintiffs'
15 industry expert, and just further sort of supports and
16 corroborates Mr. McCloskey's testimony. Different bearings
17 to handle -- there are different bearings that handle
18 different magnitudes of load. There are different bearings
19 to handle different directions of load. There are different
20 bearings that tolerate different speeds. There are different
21 bearings to deal with different types of contaminations. All
22 sorts of different bearings with different functions and
23 characteristics that you have to take into account whenever
24 you're determining an appropriate bearing for an application.
25 And it just further establishes different bearings for

1 different purposes. They are not broadly interchangeable as
2 the interchange guides show.

3 So -- so that takes us to -- so the question then
4 is in light of the very sort of basic nature of his
5 testimony, he's just outlining the basic contours of the
6 industry, providing basic facts about the industry, does he
7 have the experience to give reliable testimony about that,
8 about -- you know, that is in his report? The answer is yes.

9 So, first of all, Mr. McCloskey has worked in the
10 bearings industry for over 40 years, held positions from
11 customer service all the way up to senior management. He was
12 on a board of directors level and everything in between.
13 He's involved with training on bearings, he's been trained on
14 bearings, he's given training on bearings. He's -- and he
15 has had to -- let's go to the next slide. For example, he
16 spent 30 years at Dodge Newark, an industrial aftermarket
17 distributor. He managed bearing customer contracts and
18 training, supervised product development, was involved in all
19 aspects of the business from engineering to sales, hired and
20 trained sales staff.

21 Let's go to the next one.

22 And all of these are sort of just summary,
23 high-level bullets. If you look at his CV, it provides even
24 more detail, sort of further establishing that he has the
25 experience that is necessary to testify reliably in this

1 case.

2 So he was also spent -- he also spent ten years at
3 Command, which is another industrial aftermarket distributor.
4 He hired, trained and supervised sales staff. He helped
5 develop Command's first private brand bearings offering and
6 was involved in all aspects of that from design and
7 selection, evaluating manufacturing facilities. So this
8 notion that he had -- you know, that he had one tour -- that
9 NTN gave him a tour and that's his sole basis for knowing
10 anything about manufacturing is just not supported by the
11 record.

12 He evaluated pricing strategies, performance
13 metrics.

14 Next slide.

15 And he was also on a number of advisory councils
16 that -- for bearing manufacturers. So various bearing
17 manufacturers, including NTN, you know, have these advisory
18 councils where they invite their customers to discuss issues
19 of relevance to the industry, and he was a part of those
20 councils and supported employees on other councils, other
21 manufacturers' councils. And as part of those councils he
22 would exchange ideas about market dynamics, he would learn
23 bearing suppliers' views on manufacturing and on tradeoffs
24 between the automotive industrial markets. He -- and he did
25 tour manufacturing facilities, and that's another way which

1 he learned sort of how bearings are manufactured.

2 Again, not -- not -- you know, if he was putting in
3 his report sort of chemical formulas for the composition of
4 steel and bearings, you know, I could see an argument he --
5 he -- you know, his background wouldn't suggest that he would
6 be able to opine on that subject, but that's not what he
7 does. He provides very basic information about the
8 manufacturing of bearings, you know, such as, you know, there
9 are manufacturers in dedicated lines, that changing that line
10 involves varying costs. Those are the type of high-level
11 basic facts that are set forth in his report, and those are
12 the types of facts you would expect someone with 40 years in
13 the industry to know.

14 And let's go to the next slide.

15 So his experience also embraces each of the four
16 challenged subjects. So, you know, as we discussed, it is
17 interchangeability, manufacturing, markets and automotive.
18 So we just sort of compiled a list of bullets identifying his
19 various experience. These all come from our briefs in our
20 opposition where you can find the cites thereto. But, you
21 know, 40 years in the industry, training, responsible for
22 bearings customer accounts, on advisory councils, you know,
23 observing manufacturing processes, studied processes and
24 compositions in connection with sales pitches, you know,
25 monitored market developments, coordinated with suppliers and

1 market strategy. He studied -- and he studied -- he
2 testified he studied automotive bearings, you know, the
3 market for automotive bearings to inform strategies in his
4 market, the industrial market. And he did on occasion assess
5 supply inquiries from automotive customers. This was very
6 rare. You know, I'm not trying to exaggerate his experience
7 here. This was very rare, but he did have a few over his
8 40 years, a few supply inquiries from customers, including an
9 automotive OEM RFQ. And again, not to exaggerate his
10 experience because that happened once. In his 40 years he
11 received one automotive OEM RFQ. And what he testified
12 happened with that is he was part of the team that analyzed
13 that RFQ and ultimately determined that his company could
14 not -- could not fulfill that demand, and so they ended up
15 not responding to it. But he has experience in all facets of
16 the industry.

17 If we go to the next slide.

18 And so the Sixth Circuit has ruled that the basic
19 test, non-scientific expert testimony, and we talked before
20 about how it focuses on just experience and knowledge, you
21 know, where the expert has adequately explained how their
22 experience leads to the conclusion, why that experience is a
23 sufficient basis for the opinion, and how that experience is
24 reliably applied to the facts, it is reliable. And
25 Mr. McCloskey's report satisfies this standard. His CV, his

1 deposition testimony identifies his experience, and his
2 report shows how he's applying it.

3 Their challenge should be rejected for the same
4 reason that a similar challenge was rejected in First
5 Tennessee that it goes -- you know, that their challenge goes
6 to the weight to be given to his testimony and not his
7 admissibility.

8 THE COURT: Okay. Thank you very much.

9 MR. KESSLER: Your Honor, just one minute before we
10 turn it over to plaintiffs.

11 So I listened to the presentation, and it struck me
12 that much of the presentation of plaintiffs was actually not
13 in support of excluding Dr. McCloskey because their McCloskey
14 argument is that he's an industrial guy, he's not an
15 automotive guy. That's essentially their argument.

16 Instead, they spent the good part of their argument
17 saying, well, it is all interchangeable together; automotive,
18 industrial, they all fit together. We spent six and a half
19 hours, Your Honor will recall, on that subject. I'm not
20 asking for any time to reargue that, but I think that subject
21 is well presented to Your Honor.

22 And if you look at one slide here, 14, a picture is
23 worth a thousand words. So the sole point is that
24 Dr. McClave, who we challenge that point, treats that bearing
25 that has hundreds of people inside of it the same way as this

1 bearing that fits on the point of your finger and makes no
2 adjustment in his regression to account for any of that.
3 That was six and a half hours.

4 I'm not going to do it again, Your Honor, but I
5 would urge you when you get to that point not be distracted
6 by today's argument, which is supposed to be about
7 Dr. McCloskey, and I'm sure you will go back and spend a lot
8 of time looking at what both sides presented in those issues.

9 THE COURT: Okay.

10 MR. KESSLER: Thank you.

11 THE COURT: Reply?

12 MR. PALFIN: So there was an amended errata to
13 Mr. McCloskey's deposition testimony and I don't believe it
14 made it to the Court's record, but we can discuss with
15 plaintiffs how best to put that on the record.

16 THE COURT: Submit it.

17 MR. PALFIN: I don't think it has an impact on
18 anything we have been discussing.

19 MR. WEILL: Thank you, Keith. I have copies of the
20 amended errata by Mr. McCloskey.

21 THE COURT: All right.

22 MR. WEILL: And the reason it has some
23 significance -- I'm sorry. The reason that the direct
24 purchasers believe it has some significance is because
25 footnote 12 of the defendants' opposition to the motion to

1 strike portions of Mr. McCloskey's testimony contain
2 references to the original errata that are incorrect.

3 Briefly, Your Honor, defendants make several
4 comments that I would like to respond to. Specifically, for
5 example, with respect to the page 8 of their presentation,
6 they list among the unchallenged topics bearings pricing. In
7 fact, that the plaintiffs do challenge Mr. McCloskey's
8 ability to discuss bearings pricing insofar as it relates to
9 manufacturing because he doesn't have that information that
10 would enable him to tell us what pricing results from what
11 costs.

12 With respect to the notion -- let me address this
13 first, this notion here on page 14 of the defendants'
14 presentation. There is this idea the defendants present that
15 the direct purchasers are claiming that every bearing of
16 every type and every size is completely interchangeable with
17 every other bearing, and that doesn't make any sense and we
18 are not arguing that.

19 In fact, the references to Mr. Farmer's testimony I
20 think demonstrate that. For example, on page 13 of the
21 defendants' presentation, they cite that -- Mr. Farmer's
22 testimony to the effect that different types of bearings are
23 not inter -- are generally not interchangeable. That's true
24 because we are talking -- as page 13 shows in the picture, we
25 are talking about different types of bearings, a type being a

1 roller bearing versus a ball bearing or tapered roller
2 bearing. They are not interchangeable, Your Honor. That is
3 certainly something that we understand and have not presented
4 as any kind of defensible position. We are talking about
5 bearings and the capability of defendants to make those
6 bearings.

7 And the same goes with respect to not only the type
8 of bearing but the size of bearing, bearings. That picture
9 on page 14 that Mr. Kessler is fond of, talking about a small
10 bearing versus a very large bearing, that's a different size
11 bearing. And I will take a small bearing -- I will take the
12 large bearing, and the question is can the defendants make
13 that large bearing and sell it, and can they price fix that
14 bearing, and how does that impact the price of that bearing?
15 And so that comes within the rubric, the simplified rubric of
16 form, tapered versus roller versus needle, so on, fit, size.

17 THE COURT: So this whole argument of whether they
18 are interchangeable is --

19 MR. WEILL: It only bears --

20 THE COURT: -- it doesn't really have relevance
21 here.

22 MR. WEILL: Well, it is --

23 THE COURT: This big bearing isn't interchangeable
24 with the small bearing?

25 MR. WEILL: That's absolutely correct, Your Honor.

1 And what these catalogues tell us is that if you've got a
2 wheel hub bearing for your 2007 Escape, you can't substitute
3 it -- you can't use a roller bearing to substitute it, put it
4 in place; you have to get another wheel hub bearing. Or if
5 you have some other functions, you get the same type of
6 bearing. And the point is that the defendants manufacture
7 those bearings as these catalogues suggest.

8 In fact, when I got ready to depose Mr. McCloskey,
9 one of the puzzles I couldn't understand was his -- as I
10 mentioned, his statement, you know, this summarizes a lot of
11 what he says, but the vast majority of applications are not
12 interchangeable; that's that page 14, paragraph 13. And I am
13 thinking I don't understand why he says that because I'm
14 looking at all of these materials that he says are reliable
15 and I relied on, and they are filled with information that
16 the defendants have put together, spent I'm sure millions of
17 dollars to demonstrate to the world that they can make every
18 kind of bearing that is necessary, they can supply every type
19 of bearing.

20 So I asked Mr. McCloskey, why do you say the vast
21 majority of applications are not interchangeable and yet you
22 have these documents that say -- and also this performance
23 definition, which is odd, but you have these documents that
24 the defendants and the manufacturers that you represented
25 when you were at Command, they tell you we can interchange

1 it. You have this -- this brochure for a bearing specialist
2 that says that's part of their job to figure out what can you
3 do to substitute. And his -- he agreed that, yes, that could
4 happen. And what appears to be the reason for his statement
5 that the vast majority of applications are not
6 interchangeable is because of this notion from the defendants
7 that you can't substitute this tiny bearing here for this big
8 bearing here, but that's not what we are trying to say, Your
9 Honor.

10 And Mr. McCloskey's testimony -- let me get back to
11 Mr. McCloskey's testimony -- suggests that he doesn't seem to
12 understand that or comprehend that distinction. That if he
13 had this knowledge about bearings that is -- he's given
14 credit for, then he would be able to respond to the fact that
15 there is this entire industry built around the notion that
16 every one of these defendants can supply these bearings. And
17 the fact that these bearings are highly specialized and
18 customized doesn't make any difference, and if you get them
19 through an RFQ or if they have been sold over and over again,
20 you can get them out of catalogue, doesn't make any
21 difference because the defendants are supplying these
22 bearings.

23 There is this reference to this performance -- this
24 SKF guide, and he said I didn't put in the last page about
25 this thing, and it talks about value bearings. Value

1 bearings is the way you describe a cheap bearing. It is the
2 Chinese bearing. People don't want to put a Chinese -- I am
3 not being pejorative about Chinese, you know, as a rule, but
4 the Chinese bearings have had a history of being a lower
5 quality bearing. And that's why they don't compete with the
6 defendants' product because the defendants are at the top of
7 their game with respect to bearings. They have the best
8 bearings in the world, no questions about it.

9 And the fact that Mr. McCloskey was unaware of this
10 distinction between interchangeability among defendants and
11 the idea that, you know, you can't put a two-inch bearing
12 into a three-inch space, it just doesn't make sense. We
13 suggest it supports the notion that he really doesn't have
14 the background sufficient to make the statements that he does
15 in these -- in his declaration.

16 THE COURT: Do you think he's really saying that
17 they are interchangeable when they are different sizes or they
18 are not interchangeable? I'm not understanding this whole
19 argument because it makes no sense to me. It seems to me,
20 using your catalogue -- your phonebook example, that you have
21 a bearing that's a particular size or dimension and that
22 could be substituted for another, but you have to consider
23 other things, the force on it, et cetera. Why would he not
24 have been talking about that when he's talking about that
25 most are not interchangeable? I mean --

1 MR. WEILL: I can only chalk it down to being he
2 doesn't know, he doesn't know. He says these things and
3 yet --

4 THE COURT: Or is he coming at it from a different
5 angle? Is he coming at it --

6 MR. WEILL: He doesn't seem to have the basic
7 understanding about this notion of how you can substitute
8 these bearings.

9 THE COURT: I mean, how can somebody work for
10 40 years in the bearing industry and think you can change a
11 humongous bearing for a little bearing? I mean, a common
12 person would know that.

13 MR. WEILL: That's the point we are trying to make,
14 Your Honor, that we don't think Mr. McCloskey has the
15 background sufficient for him to present evidence that's
16 reliable.

17 THE COURT: All right. Thank you very much.

18 MR. WEILL: Thank you, Your Honor.

19 THE COURT: All right. The Court will give you an
20 opinion.

21 I want to go to -- before I hear the next motion
22 because it might affect those of you who want to stay or
23 leave. We have 6-A, the Bosal motion. I don't know what's
24 going on because we have looked and we have nothing from
25 direct purchasers.

1 MR. HANSEL: Understood, Your Honor.

2 THE COURT: I mean, you're not opposing it?

3 MR. HANSEL: We are. We have conferred with
4 counsel for Bosal, and at this time I would like to make a
5 motion that direct purchasers be permitted to file their
6 opposition to the motion to dismiss two weeks from today, and
7 I have discussed it with counsel for Bosal who is present
8 here and I understand they do not object to that.

9 THE COURT: Bosal?

10 MR. MOUW: Your Honor, we filed --

11 THE COURT: What's your name?

12 MR. MOUW: Gary Mouw, M-O-U-W, on behalf of Bosal.

13 We filed a motion to dismiss Bosal Nederland back
14 in August of last year to which there was no response from
15 direct purchaser plaintiffs. And in light of that lack of
16 response, we anticipated that it was unopposed, similar to
17 what happened with respect to the indirect purchaser
18 plaintiffs. They named one of our foreign entities, we filed
19 a motion to dismiss for lack of personal jurisdiction, and
20 after reviewing that motion they agreed to dismiss that
21 party. So not having a response, we expected that an order
22 would be issued when this finally reached a point for the
23 Court to do so.

24 A few weeks ago direct purchasers contacted us, and
25 not to put words in their mouth but I think they would say

1 that it slipped through the crack, and we agreed we weren't
2 going to request the Court to issue a decision. We were --
3 once the Court got to it and reviewed it, we anticipated a
4 decision would be reached. So now they have reviewed it, and
5 obviously it was our hope that they would say, like indirect
6 purchasers did, that we will agree to dismiss, but they want
7 to file a response in opposition.

8 So we -- it is our position that the correct
9 procedure needs to be followed for them to do so, which would
10 include a motion -- we think it should be a written motion
11 rather than one here made to the Court for leave to file a
12 response, a late response, to which then we can bring back to
13 our client and review it and address it at that time. And,
14 of course, filing a motion for leave to file a late response
15 would obviously include their proposed response brief to
16 which we can file our response, including a reply if
17 necessary. So that's what we propose in terms of the
18 procedure in light of where we stand today.

19 THE COURT: Okay. So your -- Mr. Hansel, your
20 comment they don't object, apparently they may object?

21 MR. MOUW: We need an opportunity, Your Honor -- we
22 spoke before. It was just this morning where I heard from
23 Mr. Hansel that they are, in fact, going to oppose our motion
24 to dismiss. Obviously we were hoping otherwise. So we will
25 need an opportunity to see their motion. I haven't had an

1 opportunity to consult with my client with respect to a
2 motion for leave to file. So it will be our position that
3 perhaps we will see the motion and we will just say we don't
4 object to the motion for leave and we will just deal with the
5 personal jurisdiction issue. But given the timing of this
6 morning and this just hearing of their position at 10:00, I
7 need the --

8 THE COURT: Do you want argument on your motion?

9 MR. MOUW: Sorry?

10 THE COURT: Will you want argument on your motion?

11 MR. MOUW: We have requested it so far, but, again,
12 that may change in response to what we see from -- from DPPs,
13 and we might agree to stipulate for no oral argument. But
14 when we filed our motion in August, we did request at that
15 point oral argument obviously to preserve that opportunity.

16 THE COURT: Well, my inclination is I want to give
17 them -- because it slipped through a crack, I guess it was a
18 big crack because that was a long time ago. I want to get to
19 the merits, my aim is always to get to the merits, so I think
20 what I'm going to do, over your objection maybe, is to allow
21 them to file a answer and then set it for a hearing, and you
22 can argue the whole thing then at the hearing. You can
23 include the fact that they were late --

24 MR. MOUW: Sure.

25 THE COURT: -- if you wish, but let's just move on.

1 You respond --

2 MR. HANSEL: Yes, Your Honor.

3 THE COURT: -- to the motion, include in your
4 response to the motion just the fact that it wasn't addressed
5 before for whatever reason, and let's just set it up for a
6 hearing at -- we can do it at our next status conference.
7 Okay.

8 MR. MOUW: That sounds good, Your Honor.

9 THE COURT: Otherwise we just delay things.

10 MR. MOUW: Great.

11 MR. HANSEL: Thank you, Your Honor.

12 THE COURT: Okay. Thank you. All right. I guess
13 now we will go back to steering sensors.

14 MR. MILLER: Your Honor, Todd Miller for
15 Tokai Rika.

16 The Court was notified that the motion on the
17 steering angle sensors is being deferred in light of a
18 resolution of the case by settlement, so we have --

19 THE COURT: I'm sorry, I didn't --

20 MR. MILLER: The EPPs had notified the Court
21 earlier this week.

22 THE COURT: Oh, wonderful. That takes care of that
23 motion.

24 MR. MILLER: Sorry.

25 THE COURT: It takes care of that motion?

1 MR. MILLER: Yes, it does, Your Honor, we hope.

2 THE COURT: Okay. All right. Then the next thing
3 we have on the schedule is the fairness hearing, but we have
4 to wait until 1:00 to make sure nobody shows up, so let's
5 take a lunch break. We will resume at 1:00. Thank you very
6 much.

7 THE LAW CLERK: All rise. Court is in recess.

8 (Court recessed at 12:01 p.m.)

9 — — —

10 (Court reconvened at 1:01 p.m.; Court and Counsel
11 present.)

12 THE LAW CLERK: All rise. Court is again in
13 session.

14 THE COURT: Good afternoon.

15 THE ATTORNEYS: (Collectively) good afternoon, Your
16 Honor.

17 THE COURT: All right. We have the fairness
18 hearing in the ball bearings. Let's take that one.

19 MR. KOHN: Good afternoon, Your Honor. Joseph Kohn
20 for the direct purchaser plaintiffs.

21 I'm pleased to be before you on these related
22 motions. I will be addressing the approval of the
23 settlement, and Mr. Hansel will address the counsel request
24 for costs and fees.

25 THE COURT: Okay.

1 MR. KOHN: This is a settlement between the direct
2 purchaser class and defendants MinebeaMitsumi Inc., NMB USA,
3 Inc. and MNB Technologies Corp, together are referred to as
4 the Minebea defendants.

5 Just to place a few dates on the record, we did
6 file the standard report with respect to dissemination of
7 notice dated February the 14th of 2018, and that recited that
8 pursuant to the notice order, which was entered October 25th,
9 2017, the notices were mailed to the direct purchasers.
10 There were a total of 1,047 notices mailed to class members
11 as appeared on the information from the defendants. And the
12 publication notice appeared on November 27th, 2017 in
13 The Wall Street Journal and Automotive News and on the
14 website.

15 Your Honor, this settlement agreement was executed
16 just about a year ago, February 15th, 2017. It calls for a
17 payment of \$9,750,000, which was made, has been deposited in
18 escrow, as well as the defendants' cooperation.

19 This settlement had no provisions for reduction of
20 the settlement amounts. It did have the right of the
21 defendant to walk away, a rescission right, which obviously has
22 not occurred. We were happy to report that there were no
23 opt-outs or objections with respect to this settlement, at
24 least as of the report and as of the last time we checked. I
25 don't know if somebody has shown up in the courtroom, but I

1 think I recognize everyone here and I don't see any class
2 members.

3 Your Honor, this settlement was the result of
4 fairly lengthy negotiations. The small bearing matter came
5 to light with an indictment in February of 2015 with respect
6 to Minebea. The first direct purchaser action -- we
7 immediately began discussions with Minebea at that time. The
8 first direct purchaser action was filed in November of 2015
9 naming NSK as a defendant. We have continued our
10 discussions, exchange of information with Minebea, and really
11 at the time that we concluded the settlement agreement was
12 when we filed the complaint naming Minebea at that time,
13 which was filed in March of 2017.

14 We have briefed the law with respect to settlement
15 approval, Your Honor, beginning at page 5 of the brief with
16 respect to this motion. I don't want to repeat the
17 standards, obviously the couple we touch on; the complexity,
18 likelihood of success in the case. I think the past month
19 and a half has given another layer of meat on the bones to
20 the complexity and the risks that are present in these types
21 of litigation. I will just say that I'm a little more
22 relaxed today than I was the last time I was here and perhaps
23 more sanguine about the result of this motion than the last
24 one.

25 We did have a certain amount of discovery, we did

1 have the benefit of proffers, we have received documents from
2 NSK, we have received documents from Minebea, which were
3 reviewed in connection of reaching this agreement.

4 I think the other factor to highlight or factors is
5 the reaction of the class. We have had a handful of opt-outs
6 in some of the settlements. We had no opt-outs in this one,
7 and as has been throughout the --

8 THE COURT: I was going to say I thought you were
9 talking about this one and I was going to say I didn't see
10 any opt-outs.

11 MR. KOHN: Yeah. No, just I would say, you know,
12 in the others where there has been, you know, two, three,
13 four, five. And here and also no objections at any time in
14 the DPP case, and happy to report again no objections from
15 class members with respect to this settlement.

16 We submitted the proposed final judgment order
17 which is a subject of the negotiation and stipulation with
18 the defendant, and I had a revised final one because of the
19 reference to -- some of the drafts will reference there were
20 opt-outs, et cetera, so we just cleaned that language up.

21 So we believe on February 14th was the last time we
22 submitted by the utility, and I have a paper copy of that
23 version as well.

24 THE COURT: If you have a paper copy to give to --

25 MR. KOHN: Yes.

1 THE COURT: -- Molly, I just want to make sure we
2 have the last one.

3 MR. KOHN: You can crosscheck it against the one
4 submitted on the 14th.

5 So with that, Your Honor, unless the Court has any
6 questions, I would then respectfully request the Court grant
7 approval of this settlement, which would conclude the
8 litigation for the Minebea defendants. They were an entity
9 that were not named by any of the other plaintiff classes or
10 any of the other parties. Thank you.

11 THE COURT: Okay. You've gone over the dates so
12 I'm not going to go over all of the dates on this when I give
13 my opinion.

14 Okay. Mr. Hansel.

15 MR. HANSEL: May it please the Court, Your Honor,
16 I'm here to speak in support of direct purchaser plaintiffs'
17 settlement class counsel's motion for an award of attorney
18 fees and out-of-pocket expenses in connection with Minebea
19 settlement.

20 As the Court is aware, the settlement amount is
21 \$9,750,000 plus the intangible qualitative relief of
22 cooperation, which is significant and something that we
23 believe is a major component of the settlement in connection
24 with pursuing the remaining claims against the NSK defendants
25 who are NSK Limited, NSK Americas, Inc. and NSK Corporation.

1 So that litigation continues.

2 Plaintiffs' counsel have diligently pursued this
3 claim and worked hard to efficiently resolve the Minebea
4 portion of the claim with the results that the Court has
5 before Your Honor. That work included investigating the
6 case, including the small bearings industry, drafting
7 complaints, reviewing, analyzing and coding extensive
8 documents, including many documents that we have reviewed and
9 coded in the last couple of months. We deposed an NSK
10 employee. We informally obtained relevant information
11 through a proffer from the ACPERA applicant. We've engaged
12 in lengthy arm's length settlement negotiations, prepared the
13 settlement agreement, settlement notices and briefing on
14 preliminary and final approval of the settlement. We worked
15 with the claims administrator, and that work continues, and
16 we continue the litigation against NSK.

17 We respectfully request an award of 30 percent of
18 the settlement fund, which is consistent with some of our
19 previous requests and our sort of generic attorneys' fee
20 brief that we filed with the Court some time ago at the
21 Court's request.

22 The percentage of the fund approach is the
23 preferred approach in this circuit, and at this point in the
24 litigation with this MDL having lasted as long as it has and
25 there has been so many settlements presented to the Court, we

1 find ourselves citing to Your Honor as much as any judge or
2 circuit for the authorities that we rely on, but -- so the
3 Court -- this Court, Your Honor, has awarded 30 percent
4 before, most recently for the direct purchasers in the case
5 of the wire harness settlements.

6 The Court has awarded the truck and equipment
7 dealers 33 percent of a \$4.6 million settlement fund in the
8 wire harness and OSS cases, and the auto dealers 33 and a
9 third percent of a \$55 million wire harness settlement fund.

10 Other courts in the Sixth Circuit have also awarded
11 fees in the 30 percent to one-third range.

12 There are the Pfizer -- Bowling vs. Pfizer factors
13 for attorneys' fees, which the Court is familiar with, and I
14 will try to just walk through those very quickly.

15 One is the benefit -- the value of the benefit, and
16 here it is both the settlement amount and the cooperation.

17 The value of the services on an hourly basis, that
18 takes a little more explanation. So with our original motion
19 for attorneys' fees, at the time the lodestar of direct
20 purchaser plaintiffs' counsel was about 1.2 million, which,
21 if the Court granted a 30 percent fee, would result in a
22 multiplier of 2.4. Since then with substantial additional
23 work, particularly on document review and coding, our
24 lodestar increased through the end of 2017 to 1.63 million,
25 which, if the Court granted our requested fee of 30 percent,

1 would result in a multiplier of 1.79 times. That multiplier
2 is well within the range of positive lodestar multipliers
3 found in the Sixth Circuit. For example, the Cardinal case
4 cited in our brief observed that most courts agree that
5 ranges of multipliers can go from 1.3 to 4.5 times, but in
6 that case the Court awarded a multiplier of 6. So we are
7 requesting a 30 percent fee, which would be a multiplier of
8 1.79, and, again, that's through the end of the year and we
9 have occurred additional time since then and continued to
10 litigation so it is actually lower than that.

11 And, in fact, some courts suggest that counsel use
12 current rates because of the delay in payment, and our
13 practice is generally to use historic rates. So we -- you
14 know, that if we use current rates, that would further reduce
15 the multiplier, but we have not done that.

16 So let's see here. The class's reaction to the
17 settlement also supports the requested fee and expense award.
18 In the notice to the class we informed the class that
19 plaintiffs' counsel would request a fee of up to 33 and a
20 third percent of the Minebea settlement fund plus --

21 THE COURT: That was in your notice?

22 MR. HANSEL: That's in the notice, Your Honor,
23 correct. And as the Court is aware, we are actually asking
24 for a lower fee than that, but notwithstanding that, there
25 were no objections and no requests for exclusion or opt-outs

1 from the class. So it suggests that the class overwhelmingly
2 supports the settlement as a whole, which in the notice did
3 include the proposed fee.

4 Our costs that we are seeking reimbursement of the
5 settlement fund are \$18,475.47. We submitted on
6 December 20th a proposed order to chambers using either
7 e-mail or ECF utility. I do not have that hard copy with me
8 today, but we would be happy to have one hand-delivered to
9 chambers if that would be helpful. So --

10 THE COURT: I would like to have it because I would
11 like the final last one to make sure that's the one we enter.

12 MR. HANSEL: Yes. We will have that hand-delivered
13 to chambers today.

14 THE COURT: Okay.

15 MR. HANSEL: Thank you. And so based on all of
16 that, we respectfully ask the Court to award an attorneys'
17 fees of 30 percent of the settlement fund plus the expenses
18 of \$18,475.47.

19 THE COURT: Okay.

20 MR. HANSEL: Thank you, Your Honor.

21 THE COURT: Okay. And there is nobody here
22 objecting?

23 (No response.)

24 THE COURT: All right. In terms of the approval of
25 the settlement, I'm not going to repeat everything that

1 counsel said, but I find the notice was sufficient, it was
2 very much in align with what we have been doing in all of our
3 cases, and I think, Mr. Kohn, you said there was like a
4 thousand something in terms of actual --

5 MR. KOHN: 1,047, and there's a declaration of the
6 claims administrator that's attached to that report.

7 THE COURT: Okay. Thank you. And I find that that
8 along with the publication and I think it was The Wall Street
9 Journal and Automotive News I think is sufficient notice.
10 The deadlines for objections came and went and the Court
11 received none. The Court received no notice of any opt-outs
12 and there are none here today.

13 The Court finds the proposed settlement is fair,
14 reasonable and adequate. The Court looks at any number of
15 factors. The likelihood of success, and we have gone over
16 this in our other ones, and we know that this is a very
17 complex matter and certainly success is not guaranteed in
18 these. It is, as I said, complex, and it has gone on for a
19 long time, and it could have gone on for a lot longer,
20 although Minebea is a relatively new party to our litigation
21 here, but given the complexities and the expense and duration
22 of the case, I find it is very reasonable.

23 Certainly the Court relies on the recommendation
24 and the work of experienced counsel, and I have indicated
25 this before that I think is counsel is -- has handled this

1 case extremely well, and I do rely on their arm's length
2 negotiations, which I believe has gone on here.

3 The discovery has been extensive in the whole
4 litigation, and the class members as indicated appear to be
5 satisfied because there is no commentary by way of either
6 objection or opt out. And obviously as a class, the public
7 is served to have this resolved. So the Court does find that
8 this is a fair, reasonable and adequate settlement given all
9 of the factors.

10 Now, the Court looked at the expenses here of the
11 \$19,145, and the Court will award the expenses. I want the
12 expenses as I have done before to come out of the total
13 settlement first.

14 After that we look at attorney fees. Well, before
15 I actually get to the attorney fees, I should get to the
16 class issue, and the Court does find that the class should be
17 certified. I want to say that first before I forget that.
18 Certainly there is numerosity in terms of the numbers that we
19 have indicated already, and there are questions of law that
20 are common to the question as is typical of these antitrust
21 cases, and this is a typical case, and here the direct
22 purchasers' injuries arise from the named -- from the same
23 wrong as the named representatives.

24 And I find that their representation is adequate.
25 I also find that Rule 23(b)(3) is satisfied in that the

1 plaintiffs demonstrate the common questions predominate over
2 questions affecting individual members.

3 So going back to the fees now, the fees are always
4 the thing that give me -- I have to tell you -- that give me
5 the most concern because I want to be fair to all parties.
6 And I have read -- you referred back to those briefs which we
7 had some time ago, and the Court has read those, and I have
8 read any number of cases, and I will say that I have attended
9 an any number of seminars on fees, and none it makes it any
10 clearer to me unfortunately.

11 We talked about lodestar and there are so many
12 factors that go into that timekeeping. The Court is aware
13 that some courts hire auditors and appear to think that
14 that's a very good thing to look at the timekeeping. I have
15 not taken that approach, and I appreciate the approach but I
16 don't find it to be truly satisfactory.

17 I think when we come down to it, the Court is going
18 to here award the 30 percent that has been asked for. I have
19 gone over the percentages, as you know, in other cases, 20,
20 and I said I would look at it again later, and as wise as I
21 guess I'm not, I couldn't come up with any good explanation
22 between 20, 25 and 30, and I'm being perfectly blunt with
23 you. We know these percentages stem from our personal injury
24 before we got into all of these class actions, which was
25 typical at 33 and a third percent.

1 I look at this case and I say these parties
2 probably -- the plaintiffs would not have gotten anything. I
3 mean, it would be so difficult to do this case on a
4 one-on-one basis, and there is so much iffyness in it that to
5 get involved in this and expend the money that you plaintiffs
6 have expended in order to prosecute the civil litigation, I
7 think you should be awarded, and since I know nothing better
8 since defendants, of course, they don't care what you get,
9 I'm going to go with the 30 percent.

10 I do look at the lodestar, for the record I want
11 that to be clear, and I have looked at this one, which is a
12 positive lodestar as to some of our others which were
13 negative. But as I said, there's ways around this. I mean,
14 if you raise your fees and the fees are crazy -- excuse me, I
15 mean they are extremely high right now, you can change that
16 lodestar. If you go to the fee that you started with, you
17 know, it is a different lodestar.

18 So I have just determined that given the work that
19 I have observed now through these years from the attorneys, I
20 believe that -- I do really believe that you have given the
21 time and the tremendous effort to do this and that you should
22 be appropriately compensated, so I am awarding the 30 percent
23 of the net settlement after the costs have been taken out,
24 and you may present an order to that effect.

25 MR. KOHN: Thank you, Your Honor.

1 THE COURT: Anything else?

2 MR. HANSEL: Your Honor, one question. Your Honor
3 read a number of costs, and the number I have from our brief
4 is 18,475.47, and Your Honor read a \$19,000 number. I'm not
5 sure where you got that from.

6 THE COURT: Yes. Where did I get that from? I
7 have 18,475 --

8 MR. HANSEL: That's --

9 THE LAW CLERK: It is because they had two
10 different numbers in the brief at two different spots.

11 MR. HANSEL: We did.

12 THE COURT: Okay. The actual cost, Counsel.

13 MR. HANSEL: Thank you, Your Honor.

14 THE COURT: Oh, you need to resubmit an order,
15 Molly tells me, because the order you submitted before is
16 different from what we have today.

17 MR. HANSEL: The order is different because it was
18 not net of cost, and we'll submit one that's net of cost.

19 THE LAW CLERK: Not on the attorney fees; on the
20 approval of the settlement.

21 MR. HANSEL: We will do.

22 THE COURT: Which is why I always like it at the
23 last minute because the ones before sometimes get changed.
24 All right. Thank you.

25 (At 1:23 p.m. court recessed.)

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(Court reconvened at 2:31 p.m.; Court and Counsel present.)

3

4

THE COURT: Good afternoon.

5

MS. FRUITERMAN: Good afternoon.

6

MR. PARKS: Good afternoon, Your Honor.

7

THE COURT: We are going to do the fairness hearing

8

on the TED matters.

9

MS. FRUITERMAN: Good afternoon, Your Honor.

10

Erica Fruiterman, from Duane Morris, on behalf of the truck and equipment dealership plaintiffs.

11

12

THE COURT: Just one second while I clear out some

13

of these papers here. Okay.

14

MS. FRUITERMAN: Your Honor, as you know, this

15

motion concerns our settlement with Mitsubishi Electric

16

Corporation, Mitsubishi Electric U.S. Holdings, Inc., and

17

Mitsubishi Electric Automotive America, Inc., collectively

18

the Mitsubishi Electric defendants.

19

This is the --

20

THE COURT: Could you speak into the microphone a

21

little louder please.

22

MS. FRUITERMAN: This is the first settlement we

23

have reached in starters and alternators, and the total in

24

cash benefits to the class are \$1.3 million in addition to

25

the cooperation we are receiving from Mitsubishi Electric.

1 As set forth in our moving papers, we believe that
2 this settlement is fair, reasonable and adequate, and on that
3 basis should be granted final approval.

4 This specific definition of the settlement class is
5 found in the settlement itself and is part of the public
6 record in this case.

7 Regarding the cash amount of settlement, the amount
8 was a function of several factors, including evidence of the
9 defendants' conduct and our assessment of it, the volume of
10 commerce affected or potentially affected, and the value of
11 the noncash components of the settlement such as the
12 cooperation I mentioned.

13 We believe that accounting for the prospects of
14 success the defense has asserted, the volume of commerce
15 impacted or potentially impacted, the risks of proceeding, we
16 think that the settlement is a great outcome for the class.

17 On the topic of notice, notice was provided to the
18 prospective class members in accordance with the notice plan
19 approved by this Court. That notice plan is the same as the
20 notice plan previously approved by the Court in hearings and
21 also employed in settlements involving the ADP and their
22 classes.

23 The notice plan was reviewed and determined to be
24 fair and reasonable and appropriate by the firm that we are
25 using, RG2, which the Court has previously approved for us to

1 use as consultants on notice-related issues.

2 RG2 oversaw the execution of the notice plan as
3 detailed in the declaration of Tina Chiango from RG2, which
4 is attached to our moving papers.

5 Part of the notice procedure involved setting up a
6 landing page on our website specifically for starters and
7 alternators. That page went live on October 25th, 2017. RG2
8 also worked with a third-party marketing firm and arranged
9 for summary notice to be e-mailed on November 20th, 2017 to
10 56,425 C level executives who worked at medium and heavy duty
11 truck dealerships as well as agricultural, construction,
12 mining, railroad and other commercial equipment dealers
13 within the U.S.

14 We also mailed by first class bearings notice --
15 sorry, starters and alternators notices to 47,230 addresses.
16 In addition to those mailings, an ad was placed in the weekly
17 newsletter of America Truck Dealers Association, and that
18 appeared each week for a month. Summary notice was also
19 released via a PR newswire and printed in The Wall Street
20 Journal, Automotive News and the November 2017 issue of Work
21 Truck. Also an ad was included in the National Trailer
22 Dealer Association e-newsletter.

23 We believe and represent to the Court that this
24 notice program was thorough and was designed to reach and did
25 reach a very large percentage of the potential class members.

1 As has been the case with all our settlements, the
2 reaction of the class members has been positive. There have
3 been no objections filed, no appearances entered, and no
4 opt-outs from the class.

5 We think given that, that it is important to
6 emphasize their silence in terms of recognizing the approval
7 of the class.

8 Turning to Rule 23 requirements, we believe that
9 the requirements of Rule 23 are satisfied by the settlement.
10 Just quickly walking through the factors considered by the
11 Sixth Circuit, the first, likelihood of success on the merits
12 weighed against the amount and form of relief in the
13 settlement. In weighing the risks, we note that we are
14 providing a large cash benefit of \$1.3 million to the class.
15 This is in no way a nuisance value settlement amount. It is
16 a substantial cash benefit to the class and reflects the
17 strengths and claims and risks -- the strengths and claims of
18 our claims and the risk the settling defendants may prevail
19 on some of their arguments.

20 The second factor is the complexity, expense and
21 likely duration of further litigation. I think at this point
22 the Court is well aware of the complexity of these cases and
23 the claims and defenses in this litigation. With regard to
24 expense, there would be significant expense for both the
25 plaintiffs and the defendant to continue. And as to

1 duration, we do not have class cert schedule and the
2 litigation could continue for some time. So the second
3 factor leans in favor of resolving these cases.

4 Our opinions concerning the settlement are set
5 forth in our moving papers. Obviously we would not be here
6 today if we did not think these were reasonable and fair
7 settlements for the class.

8 And although formal discovery has not begun in
9 these cases, we received extensive proffers from the ACPERA
10 applicant in the cases but also pursued and obtained
11 discovery directly from the settling defendants within the
12 scope of Federal Rule of Evidence 408.

13 Through these means were able to obtain adequate
14 information about the strengths and weaknesses of the claims
15 and defenses and to evaluate the benefit of the settlement.

16 For these reasons, we find that the settlement is
17 fair, reasonable and in the best interest of the class.

18 Again, the reaction of absent class members was
19 positive. No objections, no opt-outs, and we believe their
20 silence is a strong indication that the settlement class
21 supports the adequacy of the settlement.

22 Moving to the sixth factor, no fraud or collusion
23 took place in negotiating the settlement. This was an arm's
24 length negotiation that occurred over many months over the
25 phone and by e-mail.

1 Finally, we believe that the settlements are in the
2 public interest. Settlements generally are, especially when
3 resources are being provided to class members instead of
4 funding the litigation.

5 Briefly, with regard to the Rule 23(a) and 23(b)
6 requirements as to numerosity, you know, given the number of
7 named plaintiffs and the number of notices mailed, joinder
8 here would be impractical. There are just simply too many
9 parties for joinder.

10 As to commonality, common questions of law
11 generally occur in price fixing cases such as this one. The
12 main question was did the defendant enter into an illegal
13 arrangement to affect the prices of starters and alternators,
14 and that question was common for all plaintiffs and
15 defendants.

16 Typicality. The claims of the class representative
17 are indistinguishable from those of any class member.

18 And finally adequacy. In our opinion, the class
19 representatives have adequately and fairly protected the
20 interests of the class.

21 All right. In sum, the settlement is fair,
22 reasonable, meets the Sixth Circuit factors as well as the
23 Rule 23 requirements, and we respectfully ask that it be
24 granted final approval.

25 THE COURT: All right. Thank you.

1 MS. FRUITERMAN: Your Honor, would you like a copy
2 of the proposed order?

3 THE COURT: Yes, you could give it to my clerk,
4 please.

5 MS. FRUITERMAN: May I approach?

6 THE COURT: You may. Defense have any comment on
7 this?

8 MR. FENSKE: Your Honor, Dan Fenske for the
9 Mitsubishi Electric defendants.

10 We have nothing to add. We just urge the Court to
11 grant final approval to the settlement as fair, reasonable
12 and adequate for the reasons that counsel just discussed.

13 THE COURT: All right.

14 MR. FENSKE: Thank you.

15 THE COURT: The Court will rule on this before I
16 get to the attorney fee motion.

17 Here the issue for the Court, as counsel has
18 indicated, is whether the settlement was fair, reasonable and
19 adequate. Defense agrees with plaintiff that it is. And the
20 settlement terms are 1.3 million I believe for the TED
21 plaintiffs.

22 The Court looks at a number of factors that have
23 been referenced by plaintiff's counsel. I'm going to go over
24 them briefly for the record.

25 Likelihood of success. Certainly success is not

1 guaranteed in these cases, and by doing a settlement it does
2 guarantee a recovery for the plaintiffs, and the class
3 counsel believes in this case that the benefits of a
4 settlement outweigh any risk of continued litigation.

5 Certainly this is complex. All of these antitrust
6 cases have been quite complex, lengthy, and expensive. And
7 as been indicated, we do not know when the case would be done
8 as we haven't even gotten to the class cert timeline.

9 Experienced counsel believes that this is a fair,
10 reasonable and adequate settlement, and the Court relies
11 heavily on the -- on the beliefs of counsel, finding that
12 counsel is well served, well experienced and able to
13 negotiate these things at arm's length negotiations.

14 And obviously the settlement appears to be fair.
15 There were the notices which we will get into in a little
16 bit, but we have no opt-outs and we have no objectors. The
17 public is certainly served by having these matters resolved
18 and saving the expense and time of the Court and the parties.

19 The next issue is about this notice, and the Court
20 is satisfied that the notice is appropriate, that the service
21 that provides -- I think it is RG2 -- is it RG2? Reminds me
22 of a -- isn't there some movie about RDD2 or something? It
23 just reminds me of that. But RG2 has done appropriate
24 notices. The numbers have been, you know, 50-some thousand
25 notices in one case and publications. So I find the notice

1 has been appropriate to actually notify, and including the --
2 there was direct mail, wasn't there, also in this case?
3 Yeah, direct mail and e-mail that targeted the class members,
4 so I find that this is appropriate.

5 I also find that the class should be certified
6 pursuant to Rule 23. Certainly the -- there are questions of
7 fact that are common to the class, and we know here that the
8 common question is whether these defendants engaged in this
9 conspiracy or combination amongst themselves to fix, raise,
10 maintain or stabilize the price of the component parts. And
11 it is also -- also typicality is satisfied in that the claims
12 of the representative parties are typical of the claims of
13 the class in that the class representatives can satisfy this
14 claim.

15 I think there is also service awards, is there not,
16 in your motion, Counsel -- yes -- coming up for the named
17 class plaintiffs because of the work that they have, in fact,
18 done in this case.

19 There is -- not only do these individuals
20 adequately represent the class counsel but adequately
21 represents the class, and I believe that the plaintiff
22 representatives will fairly and adequately protect the
23 interests of the class and also the attorneys.

24 Because TED plaintiffs meet the requirements of
25 23(a), then I look at 23(b)(3), that the class demonstrates

1 common questions predominate over questions affecting only
2 individual members, and the evidence here that would show a
3 violation to one settlement class member is, in fact, common
4 to the class and will provide a violation to all.

5 A class action is a superior method, I firmly
6 believe, in adjudicating these claims. And as we know, all
7 of these claims have been centralized here, and I think that
8 this is an efficient mechanism to resolve these claims.

9 So I do find that the class as named and defined in
10 the pleadings is the appropriate way to handle this. So the
11 Court approves the settlement and I approve the -- certify
12 the class for purposes of the settlement.

13 MS. FRUITERMAN: Thank you, Your Honor.

14 THE COURT: Let's go to attorney fees and service
15 awards.

16 MS. FRUITERMAN: So as Your Honor mentioned, this
17 motion is for attorney fees, reimbursement of litigation
18 expenses and service awards. This motion covers the period
19 from the inception of the case until January 26th, 2018.

20 As the Court is aware, we have been litigating this
21 case, like our other cases, on a contingency fee basis with
22 no guarantee of recovery of our fees. We are seeking fees
23 here equal to 30 percent of the settlement amount after
24 notice and claims administration costs and escrow fees have
25 been deducted. 30 percent equals approximately \$367,000.

1 With regards to the lodestar crosscheck employed by
2 the Court, the \$367,000 in fees is approximately 100 percent
3 of the lodestar and represents a multiplier of one. This
4 lodestar includes attorney hours for attorneys at
5 Duane Morris, paralegals, library staff and technology
6 assistants who are similar to our project managers but mostly
7 manage the processing of data and preparing files for review
8 and production.

9 The total hours is approximately 630, and these
10 hours do not include time spent after January 26th preparing
11 motion papers and dealing with claims administration. The
12 specific hours and amounts are set forth in my declaration
13 attached to this motion.

14 And I would like to note that although not as
15 active as the bearings and wire harness case because formal
16 discovery has not yet commenced, informal discovery has been
17 a significant part of our efforts in the settlement context,
18 including review of information received in proffers and
19 Rule 408 volume of commerce materials.

20 The multiplier here is approximately one, but as
21 Your Honor has stated, the multiplier may be useful as a
22 crosscheck but it is not necessary in this circuit in
23 assessing the appropriate percentage in the percentage of the
24 fund approach.

25 Although we have received 33 and a third in earlier

1 requests for attorney fees from this Court, we now ask for
2 30 percent in response to Your Honor's decision at our last
3 final approval hearing where you found that 30 percent was a
4 reasonable percentage in light of the common range of 25 to
5 35 percent.

6 In our opinion, a 30 percent fee based on the
7 percentage of the fund approach that we set forth in our
8 motion is well within the range of reasonable attorney fees
9 awards approved of and awarded in the Sixth Circuit as well
10 as this Court in the truck and equipment dealers prior
11 settlements, and so we respectfully request that award here
12 as well as reimbursement of our litigation expenses.

13 With respect to the requested services awards, here
14 the class --

15 THE COURT: How many named plaintiffs do you have?

16 MS. FRUITERMAN: Twenty, Your Honor.

17 THE COURT: Pardon me?

18 MS. FRUITERMAN: Twenty.

19 THE COURT: And you are looking for the \$5,000 for
20 each of those 20?

21 MS. FRUITERMAN: Correct. Here the class
22 representatives performed and continue to perform an
23 invaluable service to the class. As you are aware, the class
24 representatives have produced and continue to produce
25 documents in response to the discovery efforts of the MDL

1 defendants. Specifically, recently the class has been asked
2 to locate dealer files in accordance with Your Honor's motion
3 that truck and equipment dealer plaintiffs needed to produce
4 those. So the location and identification of those dealer
5 files, as we set forth in our opposition, is quite a burden
6 and involves not just one centralized location but requires
7 each individual dealership to go to their files and sometimes
8 go off site to locations where those files are stored.

9 THE COURT: Do you have an estimate of how much
10 time these individual plaintiffs put into this?

11 MS. FRUITERMAN: On an individual plaintiff by
12 plaintiff basis, I do not, Your Honor. I can say that it is
13 certainly over -- at least over 100 hours in terms of back
14 and forth conversations and discussions with the class
15 representatives. I know that in addition to the
16 conversations that we have had, the class representatives
17 have had to go to each of their dealerships and talk to them.
18 There is also extensive time spent in finding out where the
19 dealer files are located and figuring out what the most cost
20 effective way of extracting those files from those locations
21 is.

22 THE COURT: So your experience in working with
23 them, you are telling me that they expended at least
24 100 hours each gathering this information?

25 MS. FRUITERMAN: No, I could not break it down by

1 dealership, Your Honor.

2 THE COURT: You're saying 100 hours total?

3 MS. FRUITERMAN: 100 hours in our direct
4 negotiations with counsel for the class representative. And
5 in addition to that back and forth with counsel, I know that
6 each dealership has had to search its own files. I can't
7 speak to exactly how much time each of those searches took.

8 THE COURT: Okay. I'm trying to pinpoint the
9 \$5,000 to each and find what -- you know, if they should get
10 that, so if they in total spent 100 hours, so they are
11 basically five hours each one, and then they had to get their
12 records.

13 MS. FRUITERMAN: It's more than five hours each
14 one, Your Honor. I can't speak to how much more, but in --
15 so, if you will remember, lots of the dealer files are
16 located off site and housed with Iron Mountain, so as an
17 initial matter, the dealership needs to determine whether it
18 has those files in its -- in the location. If it doesn't,
19 then it needs to contact Iron Mountain, find out where those
20 files are, and in many cases those files will be labeled by
21 box but not in any way -- you know, you can't go straight
22 into the box and know that it is going to there be or where
23 it is going to be in the box. So that sifting process of
24 trying to locate the files is going to be different for each
25 dealership because they don't store their files all in the

1 same method.

2 THE COURT: All right.

3 MS. FRUITERMAN: In addition, I just want to
4 mention without these class representatives' willingness to
5 bring claims and undertake these efforts, there would be no
6 settlement for the truck and equipment dealership class. And
7 as discovery proceeds, the class representatives are likely
8 to incur significant burden and expense.

9 So because of the efforts expended by the class
10 representatives and the reasonableness of the award, we
11 respectfully request \$5,000 for each named plaintiff.

12 THE COURT: Okay. In terms of the named
13 plaintiffs, I'm a little more concerned because I don't know
14 their time as to what they put in. I'm trying to make this
15 reasonable.

16 MS. FRUITERMAN: I understand, Your Honor. In the
17 past we have requested a larger fee that I think represents
18 some of those earlier efforts at the initial document
19 collection at the start of the wire harness and bearings
20 litigation and so request \$5,000 here because acknowledging
21 that the burden, although it still exists, doesn't involve
22 quite the same search for documents and production as it did
23 in the early stages of the case.

24 THE COURT: All right. Thank you.

25 MS. FRUITERMAN: Thank you, Your Honor.

1 THE COURT: All right. The Court will award the
2 service fee of the \$5,000 to each of the named plaintiffs
3 because I find, though I don't have records, which does
4 concern me, of time that they spent, I am aware of the
5 records and the volume of the records that they had to
6 discover and submit in discovery, plus the time that they
7 spent individually with the counsel.

8 The Court will award the costs which come to
9 \$38,347.78.

10 MS. FRUITERMAN: That's correct.

11 THE COURT: That will come out of -- off the top of
12 the settlement, along with the amount that's being paid to
13 the individual plaintiffs as a service award, and then the
14 attorneys will get their one -- their 30 percent. The Court
15 has gone back and forth I realize with these attorney fees,
16 and as I indicated, you probably weren't here, but in the
17 last fairness hearing we had earlier this afternoon I've just
18 come to the conclusion that the Court would use a percentage
19 of the fund -- a flat percentage of the fund of 30 percent in
20 these cases and I would crosscheck it. Now, here the
21 lodestar crosscheck is one, so it is like you are getting
22 paid actually what you put into it, and I believe -- I'm not
23 going over all of those numbers, but the multiplication works
24 out to what you had in your brief.

25 We know that the Court has to look at various

1 factors, and that's the value of the benefit rendered, the
2 society's stake in awarding attorney fees, whether the
3 services were undertaken on a contingency fee basis, the
4 complexity, the professional skill and the value of the
5 services on an hourly basis. We are not breaking these down
6 individually because we have touched on a lot of these. I
7 have indicated to you that the Court is impressed with the
8 skill of counsel and I have no problem with the hourly basis
9 and the number of hours that it's put in here.

10 And most importantly, that this was taken with no
11 guarantee of success and that the plaintiffs have put forth
12 their own -- counsel have put forth the funds in order to
13 proceed and to get these results and I think the results are
14 excellent. And that there's a strong national interest in
15 these antitrust cases to enforce and to vindicate public
16 policy. That the case is very complex, and I think obviously
17 here the lodestar confirms the percentage. So the Court will
18 award the 30 percent of the net proceeds.

19 MS. FRUITERMAN: Thank you, Your Honor. I also
20 have a copy of the proposed order if you would like.

21 THE COURT: Okay. Thank you. If you would give
22 that to my clerk, we can get that entered. Anything else?

23 MR. FENSKE: No, Your Honor.

24 THE COURT: Defense? No? I'm not used to seeing
25 defense on the plaintiff's side. You know, this is -- we

1 always do this in this MDL, I don't know why, maybe because
2 our defense counsel generally sits in the jury box, so
3 that's --

4 MR. FENSKE: There are a few more of us, Your
5 Honor.

6 THE COURT: Okay. Yeah. Thank you very much.

7 MR. FENSKE: Thank you, Your Honor.

8 MS. FRUITERMAN: Thank you, Your Honor.

9 (Proceedings concluded at 2:59 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In Re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Wednesday, February 28, 2018.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 03/23/2018

Detroit, Michigan